CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 **JULY 1, 1998** **NO. 26**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 98–57)

REVOCATION OF MARINE CHEMIST SERVICE INC. CUSTOMS GAUGER APPROVAL AND LABORATORY ACCREDITATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of Customs gauger approval and laboratory accreditations.

SUMMARY: Marine Chemist Service, Inc. of Newport News, Virginia, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has requested that the U.S. Customs Service revoke its gauger approval and laboratory accreditations. Accordingly, pursuant to 151.13(f) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval and laboratory accrediations of Marine Chemist Service, Inc. has been revoked without prejudice.

EFFECTIVE DATE: June 9, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Parker, Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Ave., NW, Suite 5.5–B, Washington, DC 20229 at (202) 927–1060.

Dated: June 11, 1998.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, June 24, 1998 (63 FR 34502)]

(T.D. 98–58)

REVOCATION OF I.N.C. SURVEYS CUSTOMS GAUGER APPROVAL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of Customs gauger approval.

SUMMARY: I.N.C. Surveys of Houston, Texas, a Customs approved gauger under Section 151.13 of the Customs Regulations (19 CFR 151.13), has requested that the U.S. Customs Service revoke its gauger approval. Accordingly, pursuant to 151.13(f) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval of I.N.C. Surveys has been revoked without prejudice.

EFFECTIVE DATE: June 4, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Parker, Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Ave., NW, Suite 5.5–B, Washington, DC 20229 at (202) 927–1060.

Dated: June 9, 1998.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, June 24, 1998 (63 FR 34502)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 17, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF GLASS "PREFORMS" USED TO PRODUCE GLASS OPTICAL FIBER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain glass articles, called "preforms," from which optical fiber is drawn. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Wash-

ington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, General Classification Branch, Office of Regulations and Rulings (202) 927–1172.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the NAFTA Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain articles of glass, called "preforms," from which optical fiber is drawn. Comments are invited on the correctness of the proposed ruling.

New York Ruling Letter (NY) B85983 dated June 18, 1997, held that glass preforms, described as solid glass rods made from fused silica and not ground or shaped, to be used as an intermediate product in the process of optical fiber manufacture, were classifiable in subheading 7002.20.10, HTSUS, as glass in rods, of fused quartz or other fused silica. NY B85983 is set forth as Attachment A to this document.

To be classified as glass in rods in subheading 7002.20.10, HTSUS, articles must be "unworked." Customs has thoroughly reviewed the manufacturing processes for glass preforms to be used to produce optical fiber. Based on the common and commercial meaning of the term "unworked," the applicable Harmonized Commodity Description and Coding System Explanatory Note (EN 70.02), and a recent Court case *(Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15 *(*CUSTOMS BULLETIN *and Decisions,* March 25, 1998, vol. 32, no. 12, 71)), it is now Customs opinion that the preforms do not qualify as "unworked" for purposes of heading 7002, HTSUS. Customs also believes that the preforms are not classifiable in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber, pursuant to General Rule of Interpretation (GRI) 2(a). This opinion is based on the determination that the preform does not have the essential character of optical fiber, based on certain recent Court decisions and EN GRI Rule 2(a)(II).

Therefore, Customs intends to revoke NY B85983 to reflect the proper classification of the glass preforms under subheading 7020.00.60, HTSUS, as other articles of glass, other. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 960948 revoking NY B85983 is set forth as Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 11, 1998.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 18, 1997.

CLA–2–70:RR:NC:2:226 B85983
Category: Classification
Tariff No. 7002.20.1000

MS. MARY E. GILL
LUCENT TECHNOLOGIES
Guilford Center 1 – 3A10
5420 Millstream Road
Greensboro, NC 27420

Re: The tariff classification of glass fused silica rods from Japan.

DEAR MS. GILL:

In your letter dated May 21, 1997, you requested a tariff classification ruling regarding solid glass rods made from fused silica.

You indicated in your letter that "glass preforms" are solid glass rods made from fused silica. There is no grinding or shaping of the rod. The finished rod is approximately 62 mm in diameter and 1500 mm in length.

You stated that the glass preform is the rod from which glass optical fiber will be fabricated. The rod will be used as an intermediate product in the process of optical fiber manufacture.

The applicable subheading for the glass fused silica rods will be 7002.20.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for glass in balls (other than microspheres of heading 7018), rods, or tubes, unworked: rods: of fused quartz or other fused silica. The rate of duty will be 1.9 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Jacob Bunin at 212–466–5796.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE.
Washington, DC.

CLA–2 RR:CR:GC 960948 PH
Category: Classification
Tariff No. 7002.20.10,
7020.00.60 and 9001.10.00

MS. MARY E. GILL
LUCENT TECHNOLOGIES
Guilford Center 1 – 3A10
5420 Millstream Road
Greensboro, NC 27420

Re: NY B85983 revoked; glass rods; unworked; other articles of glass; optical fiber; preforms; incomplete or unfinished; essential character; GRI 2(a); ENs Rule 2(a)(II); 70.02; 90.01; *Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15; *Sharp Microelectronics Technology, Inc. v. United States*, 932 F. Supp. 1499 (CIT 1996), 122 F.3d 1446 (1997).

DEAR MS. GILL:

On June 18, 1997, New York Ruling Letter (NY) B85983 was issued to you concerning "glass preforms" made from fused silica. You were advised that the merchandise was classifiable in subheading 7002.20.1000, Harmonized Tariff Schedule of the United States (HTSUS), as glass rods, unworked, of fused quartz or other fused silica. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

NY B85983 described the merchandise, "glass preforms", as solid glass rods approximately 62 mm in diameter and 1500 mm in length made from fused silica, and stated that there was no grinding or shaping of the rods. According to NY B85983, the glass preforms are the rods from which glass optical fiber is fabricated.

The preforms under consideration are produced using a process called "Vapor Axial Deposition" (VAD). The manufacturing process for producing preforms is described as follows in the *Kirk-Othmer Encyclopedia of Chemical Technology* (4th ed., vol. 4 (1994) *Glass*, 555, 614–617):

> * * * [P]ure chlorides are entrained in an oxygen carrier-gas system, accurately metered, transported, and then react at temperatures about 1500°C. The chloride reaction with oxygen, to form the desired oxides plus chlorine gas, is virtually homogeneous and produces a finely divided particulate glass material commonly called soot. * * * The glass soot is formed into solid inclusion-free glass bodies, which are then heated to temperatures where the glass is fluid enough to be drawn into optical fibers.
>
> * * * * * * *
>
> * * * The [VAD] process involves simultaneous flame deposition of both core- and cladding-glass soots onto the end ([i.e.], axially) of a rotating fused-silica target rod. The finished preform is then consolidated in a process similar to the [Outside Vapor Deposition (OVD)] process.

The consolidation portion of the OVD process is described in *Kirk-Othmer, supra*, as follows:

> * * * The preform is consolidated (sintered) between 1400 and 1550°C to a solid, bubble-free, glass blank. The consolidation process uses chlorine to rid the blank of water and trace impurities. * * * Sometimes a two-step process can be employed for efficiency. A preform is made which is roughly half core and half cladding. The sintered preform is then drawn into rod and then overclad with pure silica soot to obtain the appropriate core/clad ratio.

According to the *Fiber Optic Reference Guide*, David R. Goff (1996), 16, this phase of the OVD process begins with the removal of the "target" rod, as follows:

> * * * When the deposition is complete, the rod is removed, and the deposited material is placed into a consolidation furnace. The water vapor is removed, and the preform is collapsed to become dense, transparent glass.

The resulting preform is "* * * a magnified version of the fiber to be drawn from it" (U.S. International Trade Commission (USITC) Publication 2851, February 1995, *Industry & Trade Summary, Optical Fiber, Cable, and Bundles*, B–2). That is, the optical characteristics (including attenuation, dispersion, single or multi-mode, and wavelength *(Fiber Optic Reference Guide, supra*, at 20–30; *Just the Facts, A basic overview of fiber optics*, Corning (1995), at 15–19; *McGraw-Hill Encyclopedia of Science & Technology* (6th ed. 1987), vol. 12, 414–415, *Optical fibers))* of the optical fiber which will be drawn from the preform are determined by the preform.

To produce optical fiber from the preform, the preform is heated and drawn into a continuous strand of "hair-thin" optical fiber (*Fiber Optic Reference Guide, supra*, at 15). In USITC Publication 2851, *supra*, the process is described as follows:

> * * * The preform descends from a platform just below the top of a vertical draw tower into a furnace heated at very high temperatures to soften the glass. The softened glass is drawn by gravity to produce a fiber that is captured on spinning capstans and wheels [at 1, footnote 3].

A single preform can yield more than 30 miles of fiber (see *Collier's Encyclopedia* (1996), vol. 9, *Fiber optics*, "[a] two-foot (60-cm) tube can yield more than 30 miles (50 km) of fiber").

The optical fiber which is drawn from the preform is then protectively coated. See *Fiber Optic Reference Guide, supra*, at 15–16:

> The optical fiber is encased in several protective layers to ensure integrity under various conditions. The first layer is applied to the glass fiber as it is drawn from the preform. This coating is generally made of ultraviolet-curable acrylate or silicone, and it serves as a moisture shield and as mechanical protection during the early stages of cable production. A secondary buffer is often extruded over the primary coating to further improve the fiber's strength. [See also, *Just the Facts, A basic overview of fiber optics, supra*, p. 8, *Coating*.]

The subheadings under consideration are as follows:

> 7002.20.10: Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked: * * * Rods: Of fused quartz or other fused silica.
>
> The 1998 general column one rate of duty for goods classifiable under this provision is 0.9% *ad valorem*.
>
> 7020.00.60: Other articles of glass: * * * Other.
>
> The 1998 general column one rate of duty for goods classifiable under this provision is 5.3% *ad valorem*.
>
> 9001.10.00: Optical fibers and optical fiber bundles: optical fiber cables other than those of heading 8544 * * *: Optical fibers, optical fiber bundles and cables.
>
> The 1998 general column one rate of duty for goods classifiable under this provision is 7% *ad valorem*.

Issue:

Whether the glass preforms are classifiable as unworked glass in rods in subheading 7002.20.10, HTSUS, other articles of glass in subheading 7020.00.60, HTSUS, or optical fibers in subheading 9001.10.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) provides, in pertinent part, that:

> (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on

the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The preforms have the shape of a rod (see *Webster's New World Dictionary* (3rd Coll. Ed. 1988) *rod* "3 any straight, or almost straight, stick, shaft, bar, staff, etc., of wood, metal, or other material * * *"). To be classifiable as glass in rods in subheading 7002.20.10, the preforms must be "unworked." In regard to this requirement, EN 70.02 states that "[b]alls of this heading must be unworked; similarly rod and tubing must be unworked (i.e., as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed)."

Clearly, the preforms do not meet the above definition of "unworked" in EN 70.02. According to the available technical literature (see FACTS), in the VAD process the preform is created by the deposition of soots on a silica "target" rod. Core and cladding soots may be placed on the "target" rod simultaneously, or a two-step process, in which the core soots are first applied and then the cladding soots are applied, may be used. After deposition of the soots, the "target" rod is removed and chlorine is used to rid the article of water and impurities. The result is a preform consisting of roughly half core and half cladding. The processes performed on the "target" rod are far more than a mere cutting into lengths of glass rods the ends of which may have been smoothed. Even if the processes performed on the "target" rod are ignored (because it is removed after the deposition phase), the processes performed to create the preform are more than those contemplated by the EN requirement that a glass rod under heading 7002 be "unworked." That is, if the two-step process is used, a rod is created and then cladding is added to the rod which, by itself, is a "working" of the rod (see discussion of "further worked" and "unworked" below). Whether the two-step process or simultaneous application of core and cladding soots is used, the process is far more complex than the simple "drawing process" described in EN 70.02. Further, the additional steps performed on the article (removal of water and impurities by the use of chlorine, drawing the article into a rod which is overclad with silica soot and/or collapsing the article, as well as additional steps such as flame polishing which may be performed on the article) are more than obtaining a rod directly from the drawing process or merely cutting it into lengths and simply smoothing the ends.

This interpretation of the term "unworked" in heading 7002 is consistent with a recent case of the Court of International Trade. In *Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15 (CUSTOMS BULLETIN *and Decisions*, March 25, 1998, vol. 32, no. 12, 71), the Court interpreted the term "further worked" as it appears in subheading 7607.11.30, HTSUS. After determining that the common meaning of the term was applicable (*ibid* at 74–75, on the basis of the presumption that the commercial meaning of a term is the same as its common meaning unless the party who argues that the meanings are different proves that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade"), the Court reviewed the dictionary meaning of the words. The Court concluded:

> When cobbled together, this dictionary meaning amounts to the following: to form, fashion, or shape an existing product to a greater extent." [*ibid* at 79.]

The production process for the preforms exactly meets this definition. An existing product (the "target" rod) is formed, fashioned, or shaped to a greater extent (by deposition of soots on the "target" rod a glass article consisting of roughly half core and half cladding is fashioned, after which the "target" rod is removed and water and impurities are removed by a further process and the article may be yet further processed by additional steps such as flame polishing).

Accordingly, on the basis EN 70.02 and the Court's analysis of "further worked" in *Winter-Wolff, supra* (based on the common and commercial meaning of the term), we conclude that the preforms do not qualify as "unworked" for purposes of heading 7002, HTSUS. Therefore, they may not be classified under subheading 7002.20.10, HTSUS.

Optical fibers covered by subheading 9001.10.00, HTSUS, are described in EN 90.01 as follows:

> **Optical fibres** consist of concentric layers of glass or plastics of different refractive indices. Those drawn from glass have a very thin coating of plastics, invisible to the naked eye, which renders the fibres less prone to fracture. Optical fibres are usually presented on reels and may be several kilometers in length. * * *

Because a preform is "* * * a magnified version of the fiber to be drawn from it" (USITC Publication 2851, *supra*, B–2) and determines the optical characteristics of the optical fiber

which will be drawn from it (see above), it may be argued that, on the basis of GRI 2(a), the preforms are classifiable in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber. To be classified as an incomplete or unfinished article under GRI 2(a), the article must have the essential character of the complete or finished article.

In determining the essential character of an article under the HTSUS, the Courts have looked to the function or use of the article. See *Sharp Microelectronics Technology, Inc. v. United States*, 932 F. Supp. 1499, 1504–1505 (CIT 1996), *affirmed* 122 F.3d 1446 (1997), in which the Court cited the applicable EN to determine that the essential character, for purposes of GRI 2(a), of automatic data processing machines under heading 8471 is given by "* * * the ability to process data * * *." See also *Mita Copystar America, Inc. v. United States*, CIT Slip Op. 97–73 (1997); *Better Home Plastics Corp. v. United States*, CIT Slip Op. 96–35 (1996), *affirmed*, CAFC Appeal No. 96–1322 (1997); and *Vista International Packaging Co., v. United States*, 19 CIT 868 (1995), in which the Court looked to the role of the constituent material in relation to the use of the goods of which the material was a part in determining essential character, for purposes of GRI 3(b).

The function or use of optical fibers is to transmit information in the form of light through very thin flexible strands (see *Random House Unabridged Dictionary* (2d ed. 1993), "**optical fiber,** a very thin flexible glass or plastic strand along which large quantities of information can be transmitted in the form of light pulses: used in telecommunications, medicine, and other fields"; see also USITC Publication 2851, *supra*, B–2, defining "Optical Fiber" as "[a] long thin strand of transparent glass, plastic, or other material usually consisting of a fiber optical core and a fiber optical cladding capable of conducting light along its axial length by internal reflection"; and *Fiber Optic Reference Guide*, *supra*, at 11 ("[o]ptical fibers are extremely thin strands of ultra-pure glass designed to transmit light from a transmitter to a receiver").

Although the optical characteristics of the optical fiber may be determined by the preform from which the fiber is drawn, the preform does not have the essential physical characteristics necessary for practical use as optical fiber. It is neither thin nor flexible (in regard to the latter, we understand that "the recognized industry-standard bend diameter" provides for the looping of fiber with bend diameters as small as two inches *(Just the Facts, A basic overview of fiber optics*, *supra*, page 15, *Bending Parameters))*. These characteristics (thinness and flexibility) are necessary for the usages of optical fibers (see USITC Publication 2851, *supra*, at 1, wherein it is stated "[o]ptical fiber systems now carry the bulk of long-distance telecommunications traffic in the United States," and other communication uses are described; the relatively thick, inflexible preform simply could not be so used). The statement in EN 90.01 that "[o]ptical fibres are usually presented on reels and may be several kilometers in length" supports the treatment of thinness and flexibility as essential characteristics of optical fibers.

EN GRI Rule 2(a)(II) provides that:

> The provisions of this Rule also apply to **blanks** unless these are specified in a particular heading. The term "**blank**" means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part.
>
> Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".

The preforms may not be classified as incomplete or unfinished optical fiber under this provision because they do not have the approximate shape or outline of the finished article (the preforms are relatively thick and inflexible; optical fiber is very thin and flexible). Preforms are "[s]emi-manufactures not yet having the essential shape of the finished articles", just as in the second paragraph of EN GRI Rule 2(a)(II), above (note the reference to semi-manufactures such as "bars" above, note also that the dictionary definition of "rod", *supra*, includes bars). This also supports treatment of the preforms as other than incomplete or unfinished optical fiber.

Accordingly, the preforms may not be classified as unworked glass in rods in subheading 7002.20.10, HTSUS, because the preforms are worked (see *Winter-Wolff*, *supra*). Neither may the preforms be classified in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber (because the preforms do not have the essential character of optical fiber, and on the basis of EN GRI Rule 2(a)(II)). Therefore, we conclude that the preforms are classifiable under the provision for other articles of glass, other, in subheading 7020.00.60, HTSUS.

Holding:

The glass preforms are classifiable as other articles of glass in subheading 7020.00.60, HTSUS, and not as unworked glass in rods in subheading 7002.20.10, HTSUS (because they are worked), or incomplete or unfinished optical fibers in subheading 9001.10.00, HTSUS (see EN GRI Rule 2(a)(II)).

Effects on Other Rulings:

NY B85983 is revoked.

In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF THE CHEMICAL COMPOUND "THYMIDINE"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke four rulings pertaining to the tariff classification of the chemical compound thymidine (CAS # 50–89–5) under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke four rulings pertaining to the tariff classification of thymidine (CAS # 50–89–5).

In Headquarters Ruling Letters (HQ) 950133, issued on August 3, 1993, and HQ 955129, issued December 16, 1994, as well as New York Ruling Letters (NY) A82783, issued April 30, 1996, and NY A87265, issued October 8, 1996, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the residual provision for glycosides. HQ 950133, HQ 955129, NY A82783, and NY A87265 are set forth as Attachments A through D to this document.

Upon review of these rulings and consideration of recent amendments to Harmonized Commodity Description and Coding System Explanatory Note (EN) 29.38, Customs has determined that the above classification is in error. This product should be classified in subheading 2934.90.9000, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds:other:other:other:other."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

Customs intends to revoke HQ 950133, HQ 955129, NY A82783 and NY A87265 to reflect the proper classification of thymidine. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letters (HQ) 961901, 961902, 961903, and 961904 revoking HQ 950133, HQ 955129, NY A82783, and NY A87265, respectively, are set forth as Attachments E through H to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 16, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, August 3, 1993.

CLA-2 CO:R:C:F 950133 JGH
Category: Classification
Tariff No. 2938.90.0000

DISTRICT DIRECTOR OF CUSTOMS
One Virginia Ave
Wilmington, NC 28401

Re: Decision on application for further review of Protest No. 1503-90-000037, on the Classification of Thymidine, under the Harmonized Tariff Schedule of the United States (HTSUS), a product of Germany.

DEAR SIR:

This protest involves the classification of the chemical thymidine, entered in 1989-1990 by Burroughs-Wellcome Co.

Facts:

Thymidine was originally entered under the provision for other gums, gum-resins in subheading 1301.90.90, HTSUS. Customs changed the classification to that for other heterocyclic compounds in subheading 2934.90.50, HTSUS. In a laboratory report it was described as a white, fluffy powder; an organic, heterocyclic compound having a chemical name of 1-(2-Deoxy-B-DRibofuranosyl)-5-methyluracil.

Thymidine is described by the protestant as an intermediate chemical used in the production of zidovudine, an anti-HIV drug. It is claimed that it is derived from thymine, is a glycoside and that it is a constituent of DNA (deoxyribonucleic acid). It is further asserted that it is apparent by its chemical structure, that thymidine is a combination of a vegetable alkaloid (thymine) and a glycose (2-deoxyribose). In view of its structure, on the Protest it is contended that the thymidine is classifiable as a natural derivative of vegetable alkaloids, in subheading 2939.90.10, HTSUS, or as a derivative of glycoside in subheading 2938.90.00, HTSUS.

Issue:

Whether thymidine is classifiable under the provision for other natural derivatives of vegetable alkaloids in subheading 2939.90.10, HTSUS, other glycosides, natural or reproduced by synthesis, in subheading 2938.90.00, HTSUS, or other heterocyclic compounds in subheading 2934.90.50, HTSUS.

Law and Analysis:

The importer claims that since thymidine structurally appears to be a combination of a vegetable alkaloid (thymine) and a glycose (2-deoxyribose) it should be considered a derivative of the vegetable alkaloid thymine and, therefore, classifiable in subheading 2939.90.10,

HTSUS. We note, however, that the importer states that the thymidine nucleoside is synthesized by the cleavage of DNA structures followed by a significant number of chemical synthesis steps. The finished nucleoside, though containing chemical structure which is found in alkaloids, consists of a significant amount of chemical synthesis steps. The finished nucleoside, though containing chemical structure which is found in alkaloids, consists of a significant amount of additional structure which would make the compound different than "a simple derivatized alkaloid." For this reason and the fact that thymidine is too far removed from a naturally occurring compound to be considered a natural derivative and, in addition, the chemical structure of thymidine is clearly not similar enough to the natural product from which it is obtained, we cannot consider the product to be a natural product from which it is obtained; nor can we consider it to be a natural derivative of a vegetable alkaloid.

To be classified as a derivative of a glycoside in heading 2938, the thymidine must be either naturally occurring or synthesized in a manner so that its chemical structure is identical to the structure of a naturally occurring glycoside. In the structure of thymidine, the original base and sugar are not joined by a glycosidic linkage through an oxygen atom as are all glycosides. As mentioned, thymidine is considered a nucleoside, or more specifically a n-glycoside or a glycoside having a nitrogen atom glycosidial bond. In addition technical literature supplied establishes that thymidine is found in its free, unbound form in different types of plants and animal organisms. Since the Explanatory Note (9) to heading 2938 lists "sinigrin", an s-glycoside having a sulfur atom glycosidal bond, as a glycoside classifiable in heading 2938, it is concluded that the intent of the heading is to include an n-glycoside like thymidine.

Holding:

Thymidine is classifiable as a derivative of glycoside in subheading 2938.90.00, HTSUS. You are directed to allow the protest in full.

A copy of this decision should be furnished the protestant with the Form 19 Notice of Action.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, December 16, 1994.
CLA–2 CO:R:C:F 955129 ASM
Category: Classification
Tariff No. 2938.90.0000

MR. RAJU SHAH
OMNICHEM
1025 Charlelo Lane, #109
Elk Grove Village, IL 60007–3258

Re: Reconsideration and modification of New York Ruling Letter 877702 concerning the tariff classification of Thymidine (CAS 50– 89–5) from Germany.

DEAR MR. SHAH:

This letter is to advise you that Customs has modified New York Ruling Letter (NYRL) 877702, dated September 15, 1992, regarding the classification of Thymidine from Germany. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of NYRL 877702 was published October 5, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 39/40.

Facts:

In NYRL 877702 issued September 15, 1992, by the Area Director, New York Seaport, a product, Thymidine (CAS 50–89–5), was classified in subheading 2934.90.5000, Harmo-

nized Tariff Schedule of the United States Annotated (HTSUSA), which provides for Heterocyclic compounds, with a rate of duty of 7.9 percent *ad valorem*. We have reviewed that ruling and have found it to be in error, only with respect to the classification of Thymidine. The correct classification follows.

On August 3, 1993, Customs issued Headquarters Ruling Letter (HRL) 950133, which classified Thymidine as a derivative of a glycoside in subheading 2938.90.0000, HTSUSA. Subheading 2938.90.0000, HTSUSA, is dutiable at 3.7 percent *ad valorem* at the column one general rate.

Issue:

Whether the product, Thymidine (CAS 50–89–5), is classifiable in heading 2934, HTSUSA, as a heterocyclic compound or heading 2938, HTSUSA, as a glycoside.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

In HRL 950133, it was determined that to be classified as a derivative of a glycoside in heading 2938, HTSUSA, the Thymidine must be either naturally occurring or synthesized in a manner so that its chemical structure is identical to the structure of a naturally occurring glycoside. In addition, it was noted that regarding the structure of Thymidine, the original base and sugar are not joined by a glycosidic linkage through an oxygen atom as are all glycosides. However, it is further stated in HRL 950133, that Thymidine is considered a nucleoside, or more specifically, an "n-glycoside" or a glycoside having a nitrogen atom glycosidial bond. Since EN (9) to heading 2938 lists "sinigrin," an "s-glycoside" having a sulfur atom glycosidial bond, as a glycoside classifiable in heading 2938, it is concluded that the intent of the heading is to include an "n-glycoside" like Thymidine.

Based on the foregoing, it is the opinion of Customs Headquarters that NYRL 877702 erroneously classified the product in subheading 2934.90.5000, HTSUSA, believing it to be a heterocyclic compound.

Holding:

The product, Thymidine, is classifiable in subheading 2938.90.0000, HTSUSA, as "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives: Other." The general column one rate of duty is 3.7 percent *ad valorem*.

NYRL 877702 dated September 15, 1992, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, April 30, 1996.

CLA–2–29:RR:NC:FC:238 A82783
Category: Classification
Tariff No. 2938.90.0000

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
120 Route 17 North
P.O. Box 1579
Paramus, NJ 07653–1579

Re: The tariff classification of **Thymidine** *(CAS–50–89–5)* from Japan.

DEAR MS. VON DOEHREN:

In your letter dated April 11, 1996, you requested a tariff classification ruling.

The subject product, Thymidine, is a glycoside. You indicate in your letter that it will be used in research and development.

The applicable subheading for Thymidine will be 2938.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives: Other." The rate of duty will be 3.7 percent *ad valorem*.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, October 8, 1998.

CLA–2–29:RR:NC:2:238 A87265
Category: Classification
Tariff No. 2938.90.0000

MR. A.J. SPATARELLA
KANEMATSU USA INC.
114 West 47th Street, 23rd Floor
New York, NY 10036

Re: The tariff classification of **Thymidine** *(CAS–50–89–5)* from Japan.

DEAR MR. SPATARELLA:

In your letter dated August 2, 1996, you requested a tariff classification ruling.

The subject product, Thymidine, which has the chemical name of *1-(2-Deoxy-β-D-ribofuranosyl)-5-methyl uracil*, is an n-glycoside.

The applicable subheading for Thymidine will be 2938.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives: Other." The rate of duty will be 3.7 percent *ad valorem*.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961901 MGM
Category: Classification
Tariff No. 2934.90.9000

PORT DIRECTOR
U.S. CUSTOMS SERVICE
One Virginia Ave.
Wilmington, NC 28401

Re: Thymidine (CAS # 50–89–5); Revocation of HQ 950133.

DEAR SIR:

This office has determined that Headquarters Ruling Letter (HQ) 950133, issued to your office on August 3, 1993, in response to Protest No. 1503–90–000037 concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine (CAS # 50–89–5), is in error. Therefore, this ruling revokes HQ 950133 and sets forth the correct clasification of thymidine. The entries involved in HQ 950133, which were presumably liquidated in accordance with that decision, are not affected by the revocation.

Facts:

In HQ 950133, Customs ruled that thymidine, entered in 1989–1990 by Burroughs-Wellcome Co., was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this and other rulings classifying this merchandise, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise

required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

HQ 950133 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961902 MGM
Category: Classification
Tariff No. 2934.90.9000

MR. RAJU SHAH
OMNICHEM
1025 Charlelo Lane, # 109
Elk Grove Village, IL 60007–3258

Re: Thymidine (CAS # 50–89–5); Revocation of HQ 955129.

DEAR SIR:

This office has determined that Headquarters Ruling Letter (HQ) 955129, issued to you on December 16, 1994, concerning the classification under the Harmonized Tariff Sched-

ule of the United States Annotated (HTSUSA), of thymidine (CAS # 50–89–5), is in error. Therefore, this ruling revokes HQ 955129.

Facts:

In HQ 955129 Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

HQ 955129 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961903 MGM
Category: Classification
Tariff No. 2934.90.9000

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
120 Route 17 North
P.O. Box 1579
Paramus, NJ 07653–1579

Re: Thymidine (CAS # 50–89–5); Revocation of NY A82783.

DEAR MS. VON DOEHREN:

This office has determined that New York Ruling Letter (NY) A82783, issued to you on April 30, 1996, concerning the tariff classification, under the Harmonized Tariff Classification Schedule of the United States Annotated (HTSUSA), of thymidine, (CAS # 50–89–5) is in error. Therefore, this ruling revokes NY A82783.

Facts:

In NY A82783, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, which was issued to you on June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

NY A82783 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 961904 MGM
Category: Classification
Tariff No. 2934.90.9000

MR. A.J. SPATARELLA
KANEMATSU USA INC.
114 West 47th Street, 23rd Floor
New York, NY 10036

Re: Thymidine (CAS # 50-89-5); Revocation of NY A87265.

DEAR MR. SPATARELLA:

This office has determined that New York Ruling Letter (NY) A87265, issued to you on October 8, 1996, concerning the classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of thymidine (CAS # 50-89-5), is in error. Therefore, this ruling revokes NY A87265 and sets forth the correct classification of thymidine.

Facts:

In NY A87265, Customs ruled that thymidine was classified in subheading 2938.90.0000, HTSUSA, the provision for glycosides other than rutoside.

Upon review of this ruling, Customs has discovered an error in the classification of thymidine. This product should be classified in subheading 2934, HTSUSA, the provision for "nucleic acids and their salts; other heterocyclic compounds: other: other: other: other.

Issue:

Whether thymidine is classified under the provision for glycosides, or the provision for nucleic acids and other heterocyclic compounds.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUSA, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 2938, HTSUSA, provides for "Glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives" while heading 2934, HTSUSA, provides for "Nucleic acids and their salts; other heterocyclic compounds."

EN 29.38 states, in reference to heading 2938, HTSUSA, "this heading also excludes: (1) nucleosides and nucleotides (heading 29.34)." A nucleoside is a compound "containing a purine or pyrimidine base linked to either D-ribose, forming ribose, or D-deoxyribose," Hawley, *Condensed Chemical Dictionary*, 10th edition. "A purine or pyrimidine base in glycosidic linkage with the sugar forms a *nucleoside* (e.g. adenosine, thymidine, *q.v.*)." *The Merck Index*, 12th edition, at 1156. Both of these definitions describe thymidine, which consists of thymine (a pyrimidine derivative) linked to D-deoxyribose. Thus, thymidine is a nucleoside and should, according to EN 29.38, be classified in heading 2934, HTSUSA, rather than heading 2938, HTSUSA.

Within heading 2934, HTSUSA, thymidine is best classified in the six-digit subheading 2934.90, the residual subheading, as thymidine contains neither an unfused thiazole ring, a benzothiazole ring-system, nor a phenothiazine ring-system. At the ten-digit level, thymidine is properly classified in subheading 2934.90.9000, HTSUSA, because it is not an aromatic compound, is not a drug, nor is it listed in the *eo nomine* provisions of subheading 2934.90.7000, HTSUSA.

This is consistent with the classification of uridine in subheading 2934.90.9000, HTSUSA, in NY A84837, dated June 25, 1996. Uridine is similar to thymidine, differing only in that uridine lacks a methyl group on its pyrimidine base and has a sugar group of ribose rather than deoxyribose. Uridine is described as a "nucleoside" by the *Merck Index*.

Holding:

Thymidine is classified in subheading 2934.90.9000, HTSUSA with a 1998 general column one duty rate of 6.8% *ad valorem*.

NY A87265 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF OPTICAL FIBER ADAPTERS AND RECEPTACLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of optical fiber adapters and receptacles. These are devices used principally in data communications to facilitate the alignment and interconnection of optical fibers. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of optical fiber adapters and receptacles. Customs invites comments on the correctness of the proposed modification.

NY B81965, dated February 28, 1997, in part held that certain optical fiber adapters and receptacles were classifiable in subheading 6914.90.80, HTSUS, as other ceramic articles. This ruling was based on a finding that the articles were composite goods made up of different components, and that one such component, a split mating sleeve of zirconium oxide, imparted the essential character. *NY* B81965 is set forth as "Attachment A" to this document.

It is still Customs position that these optical fiber adapters and receptacles are composite goods classifiable as if consisting of the mating

sleeve. However, we are now of the opinion that the adapters and receptacles are classifiable in subheading 6914.90.40, HTSUS, as that provision includes ceramic mating sleeves of zirconia, imported separately. *HQ* 960922, modifying *NY* B81965, is set forth as "Attachment B" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 10, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 28, 1997.

CLA-2-74:RR:NC:GI:115 B81965
Category: Classification
Tariff No. 7419.99.5050 and 6914.90.8000

MR. DAVID P. SANDERS
LEBOEUF, LAMB, GREENE & MACRAE
1875 Connecticut Avenue, N.W.
Washington, DC 20009-5728

Re: The tariff classification of optical fiber adapters and receptacles from Japan.

DEAR MR. SANDERS:

In your letter dated January 6, 1997, you requested a tariff classification ruling, on behalf of your client, Alcoa Fujikura, Ltd. Your submitted samples will be returned to you as requested.

The subject articles are described as follows:

1) *Model No. C002499*—is an "SC-ST adapter" used to connect industry standard "SC" optical fiber connectors to "ST" connectors, thereby facilitating the transmission of optical signals through independent optical fiber cables. The article is comprised of a plastic housing, two plastic dust protection caps, a stainless steel mounting clip, a plastic sleeve holder, and a phosphor bronze split sleeve. The end user inserts an SC type optical fiber connector into one side of the split sleeve and an ST type connector into the other. Each connector encases a ferrule, which in turn, encases an optical fiber. The adapter is designed to align these ferrules properly in the split sleeve and hold them in place. It is within the split sleeve where in-line transmission of optical signals between connectors occurs. The split sleeve constitutes a very high % of the total value of the articles' component materials.

2) *Model No. C023450*—is an "SC duplex adapter" used to connect two pairs of industry standard SC connectors. This article is comprised of a plastic housing, four plastic duct protection caps, a stainless steel mounting clip, two plastic sleeve holders, and two zirconium oxide split sleeves.

3) *Model No. C042420*—is a SC 4-way adapter and is identical in all respects to the SC duplex adapter (item 2) except that it is used to connect four pairs of industry standard SC type connectors, instead of two. The article is comprised of a plastic housing, eight plastic

dust caps, two stainless steel mounting clips, four plastic sleeve holders, and four zirconium oxide split sleeves. The split sleeves constitute 84.3% of the total value, the housing 3.2%, the dust caps 4.2%, the sleeve holders 6.3%, and the clips 2%.

4) *Model No. C042404*—is a "SC 5-way adapter" and is identical to items 2 and 3 above except that it is designed to connect five pairs of industry standard SC type connectors. The article is comprised of a plastic housing, ten plastic dust caps, two stainless steel mounting clips, five plastic sleeve holders, and five zirconium oxide split sleeves. The split sleeves constitute 86.4% of the total value of the article's material, the dust caps 4%, the sleeve holders 3% and the mounting clips 1.5%.

5) *Model No. C024554*—is a "SC flat mount receptacle" and is used to connect industry standard SC connectors to active devices. The article is comprised of a nickel alloy zinc housing, a plastic dust protection cap, two nickel copper mounting screws, and a zirconium oxide split sleeve, a stainless steel sleeve holder, and a stainless steel sleeve spacer. The article itself is a mounting receptacle into which the end user attaches an SC connector and an active device such as a light emitting diode. The ferrule imbedded in the SC connector is inserted into one end of the split sleeve, while the active device is inserted into the other. The sleeve enables alignment of the optical signals so that the optical signals travelling through each of the connected devices' corresponding optical fibers can be transmitted between each other. The article is a passive unit in that it does not contain an optical element of any kind, and neither receives nor transmits the optical signal. The zirconium oxide sleeves constitute 26% of the total value of the article's material, the housing 12%, the dust cap 0.4%, the screws 0.1%, the plastic sleeve holder 1.8%, the stainless steel holder 55.6%, and the sleeve spacer 4.1%.

6) *Model No. C024562*—is a "SC flat mount duplex receptacle" and is identical in all respects to item 5 above except that it permits the connection of two industry standard SC connectors to two active devices. The article is comprised of a stainless steel housing, two plastic dust protection caps and two zirconium oxide split sleeves. The value percentages of this article are estimated to be that the zirconium oxide split sleeves will constitute the highest %.

Your items are considered to be composite goods, consisting of different materials or made up of different components. These items shall be classified as if they consisted of the material or component which gives them their essential character. In all instances, the split sleeve imparts the essential character.

The applicable subheading for item 1 will be 7419.99.5050, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of copper: other: other. The duty rate will be 2% *ad valorem*.

The applicable subheading for items 2–6 will be 6914.90.8000, HTS, which provides for other ceramic articles of zirconia. The duty rate will be 6.6% *ad valorem*.

Consideration was given to classifying items 2–6 under subheading 6914.90.4000, HTS, as you have suggested. However, these items were deemed not to be ferrules.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–466–5487.

ROBERT B. SWIERUPSKI,
Chief, Metals & Machinery Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960922 JAS
Category: Classification
Tariff No. 6914.90.40

DAVID P. SANDERS, ESQ.
LEBOEUF, LAMB, GREENE & MACRAE L.L.P.
1875 Connecticut Avenue, N.W.
Washington, DC 20009–5728

Re: *NY* B81965 Modified; optical fiber connectors, adapters, and receptacles not incorporating optical elements; ceramic articles used to join and align connectors to facilitate transmission of signals through optical fiber cables; ceramic ferrules of porcelain or China, other ceramic articles, composite goods, essential character, GRI 3; GRI 6.

DEAR MR. SANDERS:

In a letter, dated September 12, 1997, on behalf of Alcoa Fujikura, Ltd., you request reconsideration of a ruling on the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of certain optical fiber adapters and receptacles. You presented additional facts and legal arguments at a meeting in our office on April 23, 1998, which you confirmed in a memorandum of the same date.

Facts:

In *NY* B81965, dated February 28, 1997, the Chief, National Commodity Specialist Division, New York, held, among other things, that certain ceramic adapters and receptacles used in the transmission of signals through optical fibers, were classifiable in subheading 6914.90.80, HTSUS, as other ceramic articles not of porcelain or china. The adapters and receptacles in issue were found to be composite goods made up of different components, and that under General Interpretative Rule 3(b), HTSUS, the zirconium oxide split sleeves or mating sleeves in each imparted the essential character to the whole. The adapter model C002499 was held to be classifiable in subheading 7419.99.50, HTSUS, because the mating sleeve was of phosphor bronze. The classification of this article is not in issue here.

The adapters in issue are the models C023450, C042420 and C042404, while the receptacles are the models C024554 and C024562. Each adapter consists of multiple plastic dust protection caps, stainless steel mounting clips, and either two, four or five zirconium oxide tubes called split sleeves or mating sleeves, with an equal number of sleeve holders. All components are enclosed in a plastic housing. Optical connectors of the same or different sizes are press fit into each end of a split sleeve within each adapter. An optical connector consists of a plastic housing incorporating a ferrule into which an optical fiber is fixed. The function of the adapters in issue is to align the ferrules in both connectors within the split sleeve to position and connect the fibers, thereby enabling the transmission of an optical signal. The receptacles in issue function in the same way to connect standard industry connectors to active devices such as light emitting diodes (LEDs) to permit optical signals to travel between them. The zirconium oxide split sleeves in each adapter and receptacle prevent light loss which would compromise the strength of the optical signal. It is noted that the adapters and receptacles in issue will always have one or more zirconium oxide split sleeves but it is the connectors that incorporate the ferrules.

You contend that the adapters and receptacles in issue are classifiable in subheading 6914.90.40, HTSUS, as this provision, in your opinion, encompasses either ceramic ferrules imported alone, ceramic ferrules imported with mating sleeves, or ceramic mating sleeves of alumina or zirconia imported alone.

The provisions under consideration are as follows:

6914	Other ceramic articles:	
	Of porcelain or china:	
6914.10.40	Ceramic ferrules of porcelain or china, not exceeding 3 mm in diameter or 25 mm in length, having a fiber channel opening and/or ceramic mating sleeves of alumina or zirconia * * *	Free
6914.10.80	Other	
6914.90	Other:	

6914.90.40	Ceramic ferrules of alumina or zirconia, not exceeding 3 mm in diameter or 25 mm in length, having a fiber channel opening and/or ceramic mating sleeves of alumina or zirconia * * * Free
6914.90.80	Other

Issue:

Whether the optical fiber adapters and receptacles in issue, classifiable under GRI 3(b) as if consisting only of the split sleeve component of zirconium oxide, are described in subheading 6914.90.40.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 6 states, in part, that the classification of goods in the subheadings of a heading shall be in accordance with the terms of those subheadings, and that GRIs 1 through 5 may be applied, with appropriate substitution of terms.

It is well settled that drafters of statutory provisions are presumed to be versed in ordinary rules of grammatical construction. However, where a statutory provision is ambiguous or susceptible of more than one construction, the interpretation that removes the ambiguity and which represents the more likely legislative intent is preferred.

The decision in *NY* B81965 with respect to the adapters and receptacles in issue was predicated on the belief that subheading 6914.90.40, HTSUS, as drafted, encompassed only ceramic ferrules having the requisite dimensions, imported *either* with a fiber channel opening *or* a ceramic mating sleeve of alumina or zirconia. In all cases, it was felt, the ferrule must be present, so that a ceramic mating sleeve, imported alone, or an article classifiable as if consisting only of a ceramic mating sleeve, could not be classified in that subheading.

You now cite a draft memorandum from the United States International Trade Commission (USITC) to the House Ways and Means Committee that, in your opinion, is a source of legislative history that reflects the proper interpretation of the provision. The memorandum provided technical comments on a proposal to create a new heading 9902.69.14, HTSUS, to temporarily suspend duty on ceramic ferrules and mating sleeves of either alumina or zirconia. Although the proposed new heading was never enacted, it is clearly linked to the Presidential Proclamation subsequently issued to create subheadings 6914.10.40 and 6914.90.40. Accordingly, the following explanation, which appears in the draft memorandum under the heading *Product description(s) and uses*, is relevant:

> The subject goods are parts of connectors used to join and align optical fibers. A *ceramic ferrule* is a tubular object whose inside diameter is precisely sized to accommodate a single optical fiber, one of which is inserted at each end of the ferrule. A *mating sleeve* is a larger tubular object with a longitudinal slit, and is designed to hold a ferrule in place (Emphasis added).

It is clear from the draft memorandum that the connectors are not made in the United States and that the relatively high cost of the ferrules and the mating sleeves represents a large portion of the total cost of the connectors. Thus, the proposed legislation sought duty-free status *both* for the ferrules *and* for the mating sleeves.

The application of ordinary rules of grammatical construction, together with our understanding of the apparent intent of the legislation, as reflected in the draft USITC memorandum, leads us to conclude that subheading 6914.90.40, HTSUS, accords duty-free entry to: (1) separately imported ceramic ferrules of alumina or zirconia having both the requisite dimensions and a fiber channel opening; (2) such ferrules and ceramic mating sleeves of alumina or zirconia imported together, whether or not in even numbers; and, (3) ceramic mating sleeves of alumina or zirconia imported separately.

Zirconium oxide mating sleeves are described both in subheading 6914.10.40, HTSUS, and in subheading 6914.90.40, HTSUS. Neither subheading provides a description for the good that is more specific than the other. Under the authority of GRI 3(c), HTSUS, made applicable at the subheading level by GRI 6, the optical fiber adapters and receptacles in issue, classifiable as if consisting of the zirconium oxide mating sleeves, are classifiable in subheading 6914.90.40, HTSUS, as that subheading occurs last in numerical order among those which equally merit consideration.

Holding:

Optical fiber adapter models C023450, C042420 and C042404, and receptacle models C024554 and C024562, all classifiable as if consisting only of a zirconium oxide mating sleeve, are provided for in heading 6914. They are classifiable in subheading 6914.90.40, HTSUS.

NY B81965, dated February 28, 1997, is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A PORTFOLIO WITH WRITING PAD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a portfolio with a writing pad. The merchandise consists of a lined writing pad that is attached to the interior side of a zippered case. The case is composed of 100 percent polyester textile material with a leather-like trim of plastics. Comments are invited with respect to the correctness of the proposed revocation.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to, and may be inspected at, the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a writing pad enclosed in a zippered case. Customs invites comments as to the correctness of the proposed revocation.

In New York Ruling Letter (NY) C83772, dated February 2, 1998 (set forth as "Attachment A" to this document), the merchandise at issue was classified in subheading 4202.12.8030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 670, the provision for "Trunks * * * attache cases, briefcases, school satchels and similar containers: With outer surface of textile materials: Other, Attache cases * * * occupational luggage cases and similar containers: Other: Of man-made fibers."

It is now Customs position that the article described above is principally designed and intended to provide a convenient and organized method by which to write and/or take notes in various locations and circumstances, and that it is classified in subheading 4820.10.2020, HTSUSA, the provision for "Registers * * * diaries and similar articles: Diaries * * * and similar articles, Memorandum pads, letter pads and similar articles."

Customs intends to revoke NY C83772, in order to classify the merchandise in subheading 4820.10.2020, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 961418, revoking NY C83772, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 11, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, February 2, 1998.
CLA–2–42:RR:NC:TA:341 C83772
Category: Classification
Tariff No. 4202.12.8030

MS. PAULA M. CONNELLY, ESQ.
MIDDLETON SHRULL
ATTORNEYS AT LAW
44 Mall Road – Suite 208
Burlington, MA 01803–4530

Re: The tariff classification of a portfolio from Taiwan.

DEAR MS. CONNELLY:

In your letter dated January 14, 1998, on behalf of The Gem Group, Inc., you requested a classification ruling for a portfolio,

The sample submitted consists of a zippered portfolio constructed of 100 polyester man-made textile material with a writing pad. The interior features a folio section designed to

contain business papers an other related articles, a zippered full-width pocket, several slots to contain business/credit cards and a pen holder. It measures approximately 13" x 10½" x 1½". The front exterior features an aditional full-width open storage pocket. You have indicated that the sample submitted will be referred to as styles 2550, 2551, 2552 and 2553.

The applicable subheading for the portfolio of 100 percent polyester will be 4202.12.8030, Harmonized Tariff Schedule of the United States (HTS), which provides for attache cases, briefcases, school satchels, occupational luggage cases and similar containers, with outer surface of textile materials, other, of man-made fibers. The duty rate will be 19 percent *ad valorem*.

The portfolio falls within textile category designation 670. Based upon international textile trade agreements products of Taiwan are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5893.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 961418 GGD
Category: Classification
Tariff No. 4820.10.2020

PAULA M. CONNELLY, ESQUIRE
MIDDLETON & SHRULL
44 Mall Road, Suite 208
Burlington, MA 01803–4530

Re: Revocation of New York Ruling Letter (NY) C83772; articles of stationery; letter pads; memorandum pads; portfolio; not attache case, briefcase, school satchel; Headings 4820, 4202; *Avenues in Leather v. United States*, Slip Op. 98–54, Decided April 24, 1998.

DEAR MS. CONNELLY:

In New York Ruling Letter (NY) C83772, issued February 2, 1998, on behalf of The Gem Group, Incorporated, Customs classified a portfolio with writing pad in subheading 4202.12.8030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 670, which provides for "Trunks * * * attache cases, briefcases, school satchels and similar containers: With outer surface of textile materials: Other, Attache cases * * * occupational luggage cases and similar containers: Other: Of man-made fibers." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes NY C83772.

Facts:

The goods at issue, although identified by several different style numbers (2550, 2551, 2552, and 2553), apparently differ from each other only in the color of their fabric. The mer-

chandise is described as a "padfolio" and consists of a lined memorandum pad or writing pad (which measures approximately 8½ inches in width by 11¾ inches in height by ¼ inch in thickness) that is attached to the right interior side of a zippered jacket or case. The jacket, with pad inserted, measures approximately 13 inches in height by 10½ inches in width by 1 inch in depth (in the closed position). The case is zippered on 3 sides and is composed of 100 percent polyester textile material with a leather-like trim of plastics.

The interior left side of the case features 2 flat, full-width slots for papers, 1 zippered, full-width pocket, and 6 slots (1 with a see-through plastic window) for business or credit cards. There is a pen holder sewn onto the interior spine. The article's exterior front has 1 flat, full-width slot.

Issue:

Whether the article is classified in subheading 4202.12.8030, HTSUSA, the provision for attache cases, briefcases, school satchels, and similar containers; or in subheading 4820.10.2020, HTSUSA, the provision for letter pads, memorandum pads, and other articles of stationery, including jackets.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Among other merchandise, chapter 48, HTSUS, covers articles of paper or of paperboard. Note 1(h) to chapter 48, HTSUS, states that "[t]his chapter does not cover: Articles of heading 4202 (for example, travel goods)." Among the items covered by heading 4820, HTSUS, are notebooks, letter pads, memorandum pads, diaries and similar articles, binders (looseleaf or other), folders * * * and other articles of stationery * * * including cover boards and book jackets. * * * The EN to heading 4820 indicate that the heading covers various articles of stationery including (in addition to the examples noted above) notebooks of all kinds, file covers, files (other than box files), and portfolios. The EN also suggest that the goods of the heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc.

Heading 4202, HTSUS, provides, in part, for attache cases, briefcases, and similar containers. The exemplars named in heading 4202 have in common the purpose of organizing, storing, protecting, and carrying various items. EN (c) to heading 4202 indicates that the heading does not cover articles which, although they may have the character of containers, are not similar to those enumerated in the heading, for example, book covers and reading jackets, file-covers, document-jackets * * * and which are wholly or mainly covered with leather, sheeting of plastics, etc. Such articles fall in heading 4205 if made of (or covered with) leather or composition leather, and in other chapters if made of (or covered with) other materials.

In several Headquarters Ruling Letters (HQ), Customs has considered the classification of goods featuring certain characteristics common to the enumerated exemplars of headings 4202 and 4820, HTSUS. In HQ 959791 and HQ 959792, dated February 11, 1997, and issued to modify HQ 955655 and HQ 955656 (dated July 14, 1995), respectively, this office found that competition between headings 4202 and 4820 was resolved by note 1(g) to chapter 48 (now note 1(**h**) to chapter 48), which excludes articles of heading 4202 from Chapter 48. We noted the requirement of GRI 1, that "classification shall be determined according to the terms of the headings and any relative section or chapter notes," and that other GRI may be used "provided such headings or notes do not otherwise require."

Since the exclusionary note to chapter 48, HTSUS, did require that other GRI not be used to determine classification, the fact that certain of the articles subject to HQ 955655 and HQ 955656 were prima facie classifiable in heading 4202, should have precluded classification of those goods under heading 4820, HTSUS. Analysis pursuant to any GRI other than GRI 1 was therefore inappropriate. On that basis, HQ 955655 and HQ 955656 were modified by HQ 959791 and HQ 959792, respectively. The above analysis was reiterated

and fully supported in a decision by the Court of International Trade (CIT) in *Avenues in Leather v. United States*, Slip Op. 98–54, decided April 24, 1998 (hereinafter *Avenues*).

There remain a small number of rulings in which the exclusionary note to chapter 48 was applicable but **not** cited, and in which articles were found to be prima facie classifiable under both headings 4202 and 4820, HTSUS. In those rulings, the exclusionary note should have been applied to preclude classification within chapter 48. Rulings that have been issued by Customs under the provisions of 19 CFR Parts 174 or 177, that are inconsistent with the principles of the *Avenues* decision are revoked/modified by operation of law.

With regard to whether the "padfolio" is prima facie classifiable under heading 4202, HTSUS, it must be determined whether the article merely has the character of a 4202 container, or whether its purpose is to organize, store, protect, and carry various items. The "padfolio" is designed to organize and perhaps protect small and/or flat items in addition to the writing pad. The case's depth of only 1 inch, however, and its lack of handles or straps, indicate that the article is not designed to easily store, protect, and carry additional items such as a newspaper, a book, and/or other objects normally carried in an attache case or briefcase. Although the case has the character of a container, with perhaps more features than a simple jacket or cover, it does not have the requisite physical attributes Customs has found common to the containers of heading 4202. We find that the jacket's added features serve to enhance the "padfolio's" primary purpose, which is to provide a convenient and organized method by which to take notes in various locations under a variety of circumstances.

In HQ 956940, issued November 25, 1994, this office classified in subheading 4820.10.2020, HTSUSA, two styles of portfolios whose dimensions (13½ inches by 10 inches by 1 inch), features (zippered closure, pockets, slots, and pen holder), and contents (an 8½ inch by 11 inch writing pad) were essentially the same as those of the "padfolio." Although those cases also possessed some features that might be found in an attache case, it was noted that the exterior and interior pockets were essentially flat and suitable only for loose papers, business cards, and other small, flat items. We concluded that the cases functioned primarily as organizational aids for note taking and that they retained the character of jackets and covers that are not covered by heading 4202. Since heading 4820 covers letter pads, memorandum pads, and other articles of stationery with jackets or covers, the pad and its case, as a whole, constitute an article of stationery. The "padfolio" is classified in subheading 4820.10.2020, HTSUSA.

Holding:

The zippered portfolio with pad, identified as a "padfolio," and further identified by style nos. 2550, 2551, 2552, and 2553, is classified in subheading 4820.10.2020, HTSUSA, the provision for "Registers * * * diaries and similar articles: Diaries * * * and similar articles, Memorandum pads, letter pads and similar articles." The general column one duty rate is 2.8 percent *ad valorem*.

NY C83772, issued February 2, 1998, is hereby revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF SIGNAL GENERATORS

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification/revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of signal generators. These are apparatus that produce electrical signals of an assignable magnitude and frequency that are used by other equipment or apparatus that measures or checks the performance of various electrical systems. Customs invites comments on the correctness of the proposed modification and revocation.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another ruling relating to the tariff classification of signal generators. Customs invites comments on the correctness of the proposed modification and revocation.

In *NY* C86285, dated April 30, 1998, certain signal generators were held to be classifiable in subheading 8543.20.00, HTSUS, as signal generators that are electrical machines and apparatus having individual functions, not specified or included elsewhere in Chapter 85. This ruling was based on the fact that the apparatus was provided for *eo nomine*, by name, in that subheading. *NY* C86285 is set forth as "Attachment A" to this document.

PD B88154, dated August 12, 1997, in part, considered the tariff status of bit pattern generators, apparatus capable of generating both electrical and optical signals and which were used in testing communications equipment. These devices were similarly classified in subheading 8543.20.00, HTSUS. *PD* B88154 is set forth as "Attachment B" to this document.

It is now Customs position that these signal generators, also called function generators, are classifiable in subheading 9030.89.00, HTSUS, as other instruments and apparatus for measuring or checking electrical quantities. This is because Section XVI, Note 1(m), HTSUS, excludes from Chapter 85 articles of Chapter 90. Heading 9030 has been interpreted as covering not only instruments or apparatus which generally effect direct measurements, but also those which supply data to other instruments and apparatus that perform this function. *HQ* 961882 revoking *NY* C86285 is set forth as "Attachment C" to this document and *HQ* 961888 modifying *PD* B88154 is set forth as "Attachment D" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 11, 1998.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 30, 1998.

CLA-2-85:RR:NC:I: 112 C86285
Category: Classification
Tariff No. 8543.20.0000

MR. ED OHLMANN
TEKTRONIX, INC.
P.O. Box 500
Beaverton, OR 97077-0001

Re: The tariff classification of signal generators from Germany and Japan.

DEAR MR. OHLMANN:

In your letter dated March 31, 1998 you requested a tariff classification ruling.

As indicated by the submitted information, the four models of signal generators are identified as SME03, SMIQ02, SMIQ03, and R3561L. Each model produces an analog or digital signal which is used in testing to verify the accuracy of receiver devices.

The applicable subheading for the SME03, SMIQ02, SMIQ03 and R3561L signal generators will be 8543.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for signal generators. The rate of duty will be 2.9 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–466–5680.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 12, 1997.

CLA–2–90:TC:A15: MLL B88154
Category: Classification
Tariff No. 9030.89.0000 and 8543.20.0000

MR. NATHAN LAMPERT
TECHCOMP INTERNATIONAL, LTD.
5007 Concord Avenue
Great Neck, NY 11020

Re: The tariff classification of a Bit Pattern Generator and an Error Analyzer from Germany.

DEAR MR. LAMPERT:

In your letter dated July 29, 1997 you requested a tariff classification ruling.

The model SHF BPG20GIG bit pattern generator (BPG) and the model SHF EA20GIG error analyzer (EA) will be imported separately. Both devices are used in testing communications equipment. The BPG is capable of generating both electrical and optical signals. A signal is sent to the device being tested and also to an analyzer like the EA unit which then compares the signals.

The applicable subheading for the BPG20GIG bit pattern generator will be 8543.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for Electrical machines and apparatus, having functions not specified or included elsewhere in chapter 85: Signal Generators. The rate of duty will be 3.1 percent *ad valorem*. The applicable subheading for the EA20GIG error analyzer will be 9030.89.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for Oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, * * * :Other instruments and apparatus:Other. The rate of duty will be 3 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

LINDA S. BROADNAX
Area Port Director,
Area Port of Washington, DC.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 961882 JAS
Category: Classification
Tariff No. 9030.89.00

MR. ED OHLMANN
TEKTRONIX, INC.
P.O. Box 500
Beaverton, OR 97077-0001

Re: *NY* C86285 revoked; signal generator, signal-producing device for testing the accuracy of receiver devices; measuring or checking instrument; instrument that carries out steps in a process for inspecting goods, checking, *United States v. Corning Glass Works*; Section XVI, Note 1(m); *HQ* 954856.

DEAR MR. OHLMANN:

In *NY* C86285, which the Director, National Commodity Specialist Division, New York, issued to you on April 30, 1998, signal generator models SME03, SMIQ02, SMIQ03, and R3561L, were held to be classifiable in subheading 8543.20.00, Harmonized Tariff Schedule of the United States (HTSUS), as other electrical machines and apparatus, not specified or included elsewhere in Chapter 85. We have reconsidered this classification and believe that it is incorrect.

Facts:

The merchandise in issue, signal generators or function generators, are electronic instruments that produce periodic voltage or current waveforms, signals or pulses, that are used in testing and calibration applications for a variety of electronic equipment. These signal generators perform no independent measuring or checking function; rather, other instruments utilize the signals they produce to measure or check the performance of various electronic systems.

Issue:

Whether the signal generators in issue are checking instruments of heading 9030.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89-80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant heading 85.43 **ENs**, at p. 1518 and 1519, state the heading covers all electrical appliances and apparatus not falling in any other heading of Chapter 85, nor covered more specifically by a heading of any other Chapter of the Nomenclature, nor excluded by an applicable Section XVI legal note.

Section XVI, Note 1(m), HTSUS, excludes from that Section goods of Chapter 90. The issue, then, is whether there exists any provision Chapter 90 that describes the signal generators under consideration. In this regard, other **ENs**, at p. 1652, contain the following statement regarding the scope of heading 90.30 "Apart from the above-mentioned types of instruments or apparatus which generally ***effect*** direct measurements, the heading also includes those which supply the operator with certain data ***from which*** the quantity to be measured can be calculated (comparative method)." (Emphasis added.) While not necessarily conclusive, these **ENs** suggest that heading 9030 encompasses not only instruments and apparatus which directly perform a measuring or checking function, but also those which generate electrical signals utilized by other instruments and apparatus that do perform such measuring or checking functions.

On a case-by-case basis, prior administrative and judicial decisions should be considered instructive in interpreting provisions of the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS. In this respect, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) in *United States v. Corning Glass Works*, C.D. 4716, *rev'd.*, C.A.D. 1216 (1978), considered whether ampul inspection machines were measuring or checking instruments under a nearly identical provision of the Tariff Schedules of the United States (TSUS), the HTSUS predecessor tariff code. The Court recited its understanding of the common meaning of the term "checking" and concluded it encompasses machines that carry out steps in a process for inspecting ampuls to determine whether they conform to an imperfection-free standard. Limiting the provision to devices that (actually) measure or verify the accuracy of a measurement, the Court concluded, improperly renders "checking" superfluous. We find this decision instructive in determining the scope of heading 9030, particularly when read in conjunction with the referenced 90.30 **ENs**. *See* also *HQ* 954856, dated September 10, 1993, and cases cited. For these reasons, the signal generators in issue are provided for in heading 9030. Section XVI, Note 1(m) thus eliminates heading 8543 from consideration.

Holding:

Under the authority of GRI 1, signal generator models SME03, SMIQ02, SMIQ03, and R3561L, are provided for in heading 9030. They are classifiable in subheading 9030.89.00, HTSUS, as other instruments and apparatus. The rate of duty is 2.3 percent *ad valorem*.

NY C86285, dated April 30, 1998, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 961888 JAS
Category: Classification
Tariff No. 9030.89.00

MR. NATHAN LAMPERT
TECHCOMP INTERNATIONAL, LTD.
5007 Concord Avenue
Great Neck, NY 11020

Re: *PD* B88154 Modified; Bit Pattern Generator, Signal-Producing Device Used in Testing Communications Equipment; Measuring or Checking Instrument; Instrument That Carries Out Steps in a Process of Inspecting Goods, Checking, *United States v. Corning Glass Works*; Section XVI, Note 1(m); *HQ* 954856.

DEAR MR. LAMPERT:

In *PD* B88154, which the Area Port Director of Customs, Washington, D.C., issued to you on August 12, 1997, the model SHF BPG20GIG bit pattern generator was held to be classifiable in subheading 8543.20.00, Harmonized Tariff Schedule of the United States (HTSUS), as other electrical machines and apparatus, not specified or included elsewhere in Chapter 85. We have reconsidered this classification and believe that it is incorrect. The classification expressed in *PD* B88154 with respect to the model SHF EA20GIG error analyzer (EA) remains unaffected and is not in issue here.

Facts:

The model SHF BPG20GIG bit pattern generator (BPG), is described as being used in testing communications equipment. The device sends either an electrical or optical signal to the device being tested and also to the EA which compares the signals. *PD* B88154 con-

tained no further description of the BPG. However, available information suggests the BPG is a type of signal generator which performs no independent measuring or checking function; rather, other instruments like the EA utilize the signals it produces to measure or check the performance of various electronic systems.

Issue:

Whether the BPG in issue is a checking instrument of heading 9030.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant heading 85.43 **ENs**, at p. 1518 and 1519, state the heading covers all electrical appliances and apparatus not falling in any other heading of Chapter 85, nor covered more specifically by a heading of any other Chapter of the Nomenclature, nor excluded by an applicable Section XVI legal note.

Section XVI, Note 1(m), HTSUS, excludes from that Section goods of Chapter 90. The issue, then, is whether there exists any provision in Chapter 90 that describes the BPG under consideration. In this regard, other **ENs**, at p. 1652, contain the following statement regarding the scope of heading 90.30 "Apart from the above-mentioned types of instruments or apparatus which generally ***effect*** direct measurements, the heading also includes those which supply the operator with certain data ***from which*** the quantity to be measured can be calculated (comparative method)." (Emphasis added). While not necessarily conclusive, these **ENs** suggest that heading 9030 encompasses not only instruments and apparatus which directly perform a measuring or checking function, but also those which generate electrical signals utilized by other instruments and apparatus that do perform such measuring or checking functions.

On a case-by-case basis, prior administrative and judicial decisions should be considered instructive in interpreting provisions of the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS. In this respect, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) in *United States v. Corning Glass Works*, C.D. 4716, *rev'd.*, C.A.D. 1216 (1978), considered whether ampul inspection machines were measuring or checking instruments under a nearly identical provision of the Tariff Schedules of the United States (TSUS), the HTSUS predecessor tariff code. The Court recited its understanding of the common meaning of the term "checking" and concluded it encompasses machines that carry out steps in a process for inspecting ampuls to determine whether they conform to an imperfection-free standard. Limiting the provision to devices that (actually) measure or verify the accuracy of a measurement, the Court concluded, improperly renders "checking" superfluous. We find this decision instructive in determining the scope of heading 9030, particularly when read in conjunction with the referenced 90.30 **ENs**. *See* also *HQ* 954856, dated September 10, 1993, and cases cited. For these reasons, we conclude that the BPG in issue here is provided for in heading 9030. Section XVI, Note 1(m) thus eliminates heading 8543 from consideration.

Holding:

Under the authority of GRI 1, the model SHF BPG20GIG bit pattern generator is provided for in heading 9030. It is classifiable in subheading 9030.89.00, HTSUS, as other instruments and apparatus. The rate of duty is 2.3 percent *ad valorem*.

PD B88154, dated August 12, 1997, is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF KEY RING/FINDER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "keyfinder" key ring. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before July 31, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the above address.

FOR FURTHER INFORMATION CONTACT: Herminio M. Castro, General Classification Branch (202) 927–2244.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "keyfinder" key ring. Customs invites comments on the correctness of the proposed revocation.

In NY Ruling Letter (NY) B82059, issued on March 3, 1997, Customs ruled that the key ring was classifiable as a flashlight under subheading 8513.10.20, Harmonized Tariff Schedule of the United States (HTSUS). It was determined that the essential character of the merchandise is imparted by the light component. NY B82059 is set forth in "Attachment A" to this document.

We now believe that the "keyfinder" key ring is properly classifiable under subheading 8531.80.90, HTSUS, which provides for other electric sound or visual signaling apparatus. Customs intends to revoke NY B82059 to reflect the proper classification of the "keyfinder" key ring under subheading 8531.80.90, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling HQ 960460, revoking NY B82059, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 12, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 3, 1997.

CLA-2-85:RR:NC:2: 227 B82059
Category: Classification
Tariff No. 8513.10.2000

MS. CONNIE POLLAUF
TRANS-WORLD SHIPPING SERVICE, INC.
3206 Frenchmens Road
P.O. Box 795
Toledo, OH 43697-0795

Re: The tariff classification of a flashlight from China.

DEAR MS. POLLAUF:

In your letter dated February 3, 1997, on behalf of Mark Feldstein & Associates, you requested a tariff classification ruling.

The sample submitted is a small plastic circular-shape flashlight which measures about 1 3/4 inches in diameter and features a metal key ring affixed to its bottom portion. It possesses a button mechanism, at its top midsection, which activates the light. It is stated that whistling triggers the emission of a beeping noise for the purpose of locating the keys by sound.

You claim that this merchandise should be properly classified under subheading 7326.20.0050, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of iron or steel wire. This assertion is supported in stating that the subject article is a key holder/finder which functions principally to hold the keys as well as finding them, when misplaced, through the discharge of a beeping sound that is activated by whistling.

Although this article can be used as a key ring/finder, this role is basically an adjunct to its principle use as a "flashlight" which has been defined as a small battery-operated portable electric light, normally held in the hand by the housing itself, whose primary function is to project a beam of light. Since it meets the above definition, based on its design and function, it has been determined that the essential character of the article is imparted by the flashlight and, therefore, will be classified as such for tariff purposes.

The applicable subheading for this flashlight will be 8513.10.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for portable electric lamps designed to function by their own source of energy * * *lamps: flashlights. The rate of duty will be 17.5 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions

regarding the ruling, contact National Import Specialist George Kalkines at 212–466–5794.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960460 HMC
Category: Classification
Tariff No. 8531.80.90

MRS. WYNN SPURGEON
VICE PRESIDENT
TRANS-WORLD SHIPPING SERVICE, INC.
3206 Frenchmens Road
P.O. Box 795
Toledo, OH 43697–0795

Re: "Keyfinder" Key Ring; Explanatory Note VIII to GRI 3(b); Explanatory Note 73.26; other articles of iron or steel wire; other sound signaling apparatus; HQ 087831; HQ 950636; HQ 958452; NY B82059, revoked.

DEAR MRS. SPURGEON:

This is in response to your letter, dated March 28, 1997, on behalf of Mark Feldstein & Associates, requesting reconsideration of New York Ruling Letter (NY) B82059, dated March 3, 1997. In NY B82059, Customs classified a "keyfinder" key ring from China, more specifically described below, under the provision for flashlights under subheading 8513.10.20 of the Harmonized Tariff Schedule of the United States (HTSUS). A sample was submitted with your letter.

Facts:

The merchandise is a novelty "keyfinder" key ring, consisting of a metal key ring attached to a round plastic casing with a button on the top midsection. The plastic casing is approximately 1 3/4 inches in diameter, which houses a battery operated, electronic beeper and red light. The beeper and red light are activated when a person whistles; and, the red light also lights up when the top button is pressed. The light is at one end of the casing, protected by a clear plastic cover that measures approximately 5/8 of an inch. You state that the beeping noise and light help locate keys, if misplaced.

The provisions under consideration are as follows:

7326	Other articles of iron or steel:	
7326.20.00	Articles of iron or steel wire	4.3%
*	* * * * * *	*
8513	Portable electric lamps designed to function by their own source of energy (for example, dry batteries, storage batteries, magnetos), other than lighting equipment of heading 8512; parts thereof:	
8513.10	Lamps:	
8513.10.20	Flashlight	15%
*	* * * * * * *	*
8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:	
8531.80	Other apparatus:	
	Other:	
8531.80.90	Other	1.6%

Issue:

Whether the key ring/finder is classifiable as flashlights under subheading 8513.10.20, HTSUS, as other signaling apparatus under subheading 8531.80.90, HTSUS, or as articles of steel wire under subheading 7326.20.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The subject key ring consisting of a metal ring attached to a novelty item is not specifically provided in any one heading of the HTSUS. In NY B82059, the key ring was classified as a flashlight of heading 8513, HTSUS, because it was determined that the essential character of the article is imparted by the light. We note that the article is also described by heading 7326, HTSUS, as an article of iron or steel wire and in heading 8531, HTSUS, as an other signaling apparatus.

The key ring cannot be classified by reference to GRI 1 because the components are *prima facie* classifiable in different headings. GRI 3(a) states that when, by application of GRI 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

In this instance we have a composite good. The "keyfinder" is made up of a light and a beeper, attached to a split metal ring. The different components are mutually complementary and form a whole that would not normally be sold separately. Since the merchandise is a composite good, described in part by two or more headings, we must apply GRI 3(b), which provides that composite goods are to be classified according to the component that gives the good its essential character.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized system. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the EN's should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Explanatory Note (VIII) to GRI 3(b), at page 4, states that the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. It is the role of the constituent materials in relation to the use of the goods that imparts the essential character to the "keyfinder" key ring in this case.

NY B82059 found that the essential character of the article is imparted by the light component because its primary function is to project a beam of light. Customs has nevertheless held that, as between the plastic and steel components in key chains, it is the steel element which provides the essential character of the item. The steel component is what makes up the utilitarian portion of the key ring, whereas the plastic component is present primarily for decorative purposes. *See* HQ 087831, dated November 27, 1990, HQ 950636, dated January 16, 1992, and HQ 958452, dated July 3, 1996. In these rulings Customs found that the novelty items attached to the key chains did not possess any utilitarian purpose. In contrast, the attachment in this instance performs a function, and we must then determine which component performs the primary function.

The "keyfinder" key ring's attachment beeps and lights up, when a person whistles, in order to locate lost keys. This we believe is the primary function of the subject article. The merchandise will be purchased for its key finding capability and not simply for holding keys. The key holding function of the metal ring is only subsidiary to the function performed by the beeper component. Also, we believe the red light, in this instance, is too weak to be considered a projected beam of light as emitted by a flashlight. We therefore conclude that neither the light nor the metal ring imparts the essential character in the "keyfinder" key ring.

Heading 8531 includes electric sound or visual signaling apparatus. EN 85.31 states, in part, at page 1496, that heading 8531 covers all electrical apparatus used for signaling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms). We find that the beeper component imparts the essential character and that the "keyfinder" key ring is described by heading 8531. It is classifiable under subheading 8531.80.90, HTSUS. Accordingly, NY B82059 must be revoked.

Holding:

Under the authority of GRI 3(b), the "keyfinder" key ring is classifiable in subheading 8531.80.90, HTSUS, as electric sound or visual signaling apparatus: other apparatus: other: other. The rate of duty is 1.6%.

Effect on Other Rulings:

NY B82059, dated March 3, 1997, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A TEXTILE BAG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a textile bag. The merchandise consists of a storage bag designed to contain the optional hardtop of a BMW Z3 roadster. The bag is composed of 100 percent nylon with polyvinyl chloride (PVC) trim.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 31, 1998.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 13, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 19, proposing to revoke a ruling letter pertaining to the tariff classification of a textile bag.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation

Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a textile bag.

In New York Ruling Letter (NY) C80418, dated October 20, 1997, the merchandise at issue was classified in subheading 4202.92.9025, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 670, the provision for "Trunks * * * traveling bags * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, With outer surface of textile materials: Other: Of man-made fibers."

It is now Customs position that the article described above is principally designed and intended for the seasonal storage and protection of the optional hardtop for a BMW Z3 roadster convertible, and is properly classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up [textile] articles, including dress patterns: Other: Other: Other, Other: Other."

Customs is revoking NY C80418, in order to classify the merchandise in subheading 6307.90.9989, HTSUSA. Headquarters Ruling Letter (HQ) 961294, revoking NY C80418, is set forth as "Attachment" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute of change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 17, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 17, 1998.

CLA–2 RR:CR:TE 961294 GGD
Category: Classification
Tariff No. 6307.90.9989

SIDNEY H. KUFLIK, ESQUIRE
LAMB & LERCH
233 Broadway
New York, NY 10279

Re: Revocation of New York Ruling Letter (NY) C80418; other made up article of textiles; storage bag, not traveling bag; *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd, 69 F.3d 495 (Fed. Cir. 1995).

DEAR MR. KUFLIK:

In New York Ruling Letter (NY) C80418, issued October 20, 1997, Customs classified a large textile bag in subheading 4202.92.9025, Harmonized Tariff Schedule of the United

States Annotated (HTSUSA), textile category 670, which provides for "Trunks * * * traveling bags * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, With outer surface of textile materials: Other: Of man-made fibers." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes NY C80418.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY C80418 was published on May 13, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 19.

Facts:

The merchandise at issue is described as a storage bag or covering for the hardtop of a BMW Z3 roadster. When laid out in a flat manner, the article measures approximately 53 inches in height by 58 inches in width at its widest part (and 47 inches in width at its narrowest part). The bag is composed of 100 percent nylon textile material with polyvinyl chloride (PVC) trim. At the top of the bag, there is a full-width, zippered opening and a textile webbed carrying handle. Two nonadjustable textile webbed straps measuring approximately 38 inches in length are joined to the bag near the top center and at the lower sides. A short, thick loop of webbed textile material also protrudes from each of the two lower sides. The carrying handle, straps, and loops are primarily designed as options for suspending the hardtop from a wall, a ceiling, etc., in a balanced manner which harms neither the load-bearing surface nor the hardtop. The bag is not primarily designed to carry the hardtop – which is said to weigh approximately 85 pounds – more than very short distances. Although the BMW Z3 roadster is a convertible, the hardtop is offered as an optional attachment for use on the vehicle, for instance, in colder climates on a seasonal basis. The bag is used essentially to protect the hardtop during storage and is not used while the hardtop is attached to the vehicle.

Issue:

Whether the merchandise is classified in heading 4202, HTSUS, as a traveling bag; in heading 8708, HTSUS, as a motor vehicle part or accessory; or in heading 6307, HTSUS, as an other made up textile article.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUS, provides for:

> "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper."

In *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd, 69 F.3d 495 (Fed. Cir. 1995), the Court of International Trade (CIT) examined the classification of automobile trunk organizers (described as bags or cases designed to store trunk necessities such as jumper cables, tire inflator, tools, antifreeze, oil, and other fluids, etc., in a neat and orderly manner) and the application of ejusdem generis, to determine whether the organizers were of the same class or kind of containers as the listed 4202 exemplars. The Court found significant disparity in the physical characteristics, purposes, and uses of the individual heading 4202 exemplars, but emphasized that the essential characteristics and purposes of all of the exemplars were **to organize, store, protect and carry various**

items. The capability of the trunk organizers to **carry** – not to organize, store, and protect – was a central issue in the case. After having stipulated to the fact that the organizers had hefty web handles for easy carrying, the plaintiff subsequently attempted to minimize the organizers' carrying capacity and function. The Court, however, rejected any requirement that the principal design feature of an article classified as a "similar container" under heading 4202 be portability or transportation of the contents.

Like the trunk organizers, the subject textile bag is not principally designed for the transportation of contents. The CIT in *Totes*, recognized that portability is usually an incidental purpose of jewelry boxes and certain tool chests classifiable in heading 4202, but noted that those containers nevertheless retained their primary uses to organize, store and protect articles. However, unlike the trunk organizers – which featured internal movable dividers by which a variety of items could be compartmentalized – the subject textile bag features little in the way of organizational characteristics. The essential characteristics and purpose of the textile bag is to store and protect a motor vehicle's hardtop, not to organize, store, protect and carry various items. We find that the clear presence of only two of the four essential characteristics of heading 4202 exemplars provides an insufficient basis upon which to classify the textile bag as a "similar container."

Among other goods, heading 8708, HTSUS, covers parts and accessories of motor vehicles. The EN to heading 8708 state that the heading covers parts and accessories of the motor vehicles of headings 8701 to 8705, provided that the parts and accessories fulfil **both** of the following conditions:

> (i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles; and
> (ii) They must not be excluded by the provisions of the Notes to Section XVII.

Textile bags for the storage and protection of a motor vehicle hardtop are not excluded by the provisions of the Notes to Section XVII. To determine whether the bag is suitable for use solely or principally with a motor vehicle so as to be classified as a part or accessory, we look to a discussion of the term "part" in *United States v. Willoughby Camera Stores, Inc.* (hereinafter *Willoughby*), 21 C.C.P.A. 322 (1933). The case involved the classification of an imported tripod which was not solely used with cameras and had various other purposes. The Customs Court stated that a part "is an integral, constituent, or component * * *without which the article to which it is to be joined, could not function as such article." In *United States v. Pompeo* (hereinafter *Pompeo*), 43 C.C.P.A. 9 (1955), the issue was whether an imported supercharger was properly considered a part of an automobile. The Government had argued that, because an automobile was able to function with or without it, the supercharger was not a part. The Court disagreed, focusing on the nature of the supercharger, which was "dedicated irrevocably for use upon automobiles," and held that the article was properly classified as a part of an automobile.

The textile bag does not satisfy the requirements of a "part" under the standards of either *Willoughby* or *Pompeo*, or fulfil the conditions of the EN to heading 8708 for classification as a part or accessory. The bag is never "joined" to the BMW Z3 roadster, is not actually used upon the automobile itself, and does not affect the vehicle's function. Since the bag is used only after the hardtop has been detached from the vehicle, it cannot be found to be suitable for use solely or principally **with** the vehicle. The textile bag is therefore not classified as a part or accessory of a motor vehicle. (But see NY 873356, issued April 21, 1992, and NY 864763, issued July 8, 1991, in which an automobile trunk cover and an article specifically designed and fitted to cover the windows and roof of a Chevrolet Corvette automobile, respectively, were classified under heading 8708, HTSUS. Unlike the subject textile bag, however, each of those items was intended for attachment directly to, and suitable for use solely or principally with, a motor vehicle.)

Heading 6307, HTSUS, covers other made up textile articles, including dress patterns. The EN to heading 6307 indicate that the heading covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature. The EN indicate that the heading excludes travel goods (suitcases, rucksacks, etc.), shopping-bags, toilet-cases, etc., and all similar containers of heading 4202. The EN also state, in pertinent part, that the heading includes loose covers for motor-cars, domestic laundry or shoe bags and similar articles. Loose covers for automobiles, as well as laundry and shoe bags, share the essential purposes of storage and/or protection. In light of this fact and the foregoing discussion, we find that the textile storage bag is classified in subheading 6307.90.9989, HTSUSA.

Holding:

The textile storage bag for the hardtop of a BMW Z3 roadster convertible is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent *ad valorem*.

NY C80418, issued October 20, 1997, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF DRILLED SOFTWOOD STUDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of certain drilled softwood studs. Notice of the proposed revocation was published on April 15, 1998, in the CUSTOMS BULLETIN, Vol. 32, No. 15. In total, 1,795 comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 31, 1998.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 927–2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 15, 1998, a notice of proposed revocation of NY B81564, dated February 18, 1997, was published in the CUSTOMS BULLETIN, Volume 32, No. 15. In total, 1,795 comments were received in response to this notice.

In New York Ruling Letter (NY) B81564, dated Febuary 18, 1997, drilled softwood studs were classified in subheading 4418.90.4040, Harmonized Tariff Schedule of the United States (HTSUS), in the provision for builder's joinery and carpentry of wood. The issuance of NY B91564, resulted in questions regarding Customs' classification of the subject

drilled softwood lumber. Generally, in addition to issues concerning the correctness of the classification per se, the allegation was made that Customs' decision could result in circumvention of the "1996 Softwood Lumber Agreement between the Government of the United States of America and the Government of Canada" by shifting certain lumber from heading 4407, which is subject to the Agreement, to heading 4418, which is not subject to the Agreement. On October 27, 1997, the agency also published a Federal Register document (62 Fed. Reg. 55667) soliciting comments regarding the commercial uses of wood studs with drilled holes.

Based on the Customs Service's review of the issue and its analysis of the comments, Customs believes that the subject drilled softwood studs are properly classifiable in heading 4407.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY B81564 and is adopting HQ 961555 to reflect proper classification of the subject drilled softwood studs in heading 4407 for the reasons set forth in the CUSTOMS BULLETIN Notice of Proposed Revocation and in HQ 961555. HQ 961555 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 26, 1998.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 26, 1998.
CLA–2 RR:TC:TE 961555 jb
Category: Classification
Tariff No. 4407.10.0015

MR. DAVE WALSER
ARTHUR J. HUMPHREYS DIV
BORDER BROKERAGE CO., INC.
P.O. Box 249
Sumas, WA 98295

Re: Classification of drilled softwood studs; heading 4407.

DEAR MR. WALSER:

On February 18, 1997, our New York office issued to you New York Ruling Letter (NY) B81564, which addressed spruce/pine/fir boards used as studs in framing a house. This let-

ter is to inform you that after review of that ruling, it has been determined that the classification of that merchandise in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS) is incorrect. As such, NY B81564 is revoked pursuant to the analysis which follows below.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), Customs is revoking NY B81564 to reflect proper classification of the subject drilled softwood studs in heading 4407. A notice of proposed revocation of NY B81564 was published on April 15, 1998, in the CUSTOMS BULLETIN, Vol. 32, No. 15. In total 1,1795 comments were received in response to this notice.

Facts:

The submitted merchandise consists of drilled softwood studs used in framing applications. The studs measure 2″ by 4″, and 2″ by 6″, in lengths of 8 to 10 feet and feature two one-inch diameter holes drilled in the center of each board (about 16 inches from each end). It was indicated that the holes served the purpose of allowing electrical wiring, cables or pipes to be run through the studs during wall construction. As such, the subject merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

As heading 4407 resides at the beginning of Chapter 44, HTSUS, it reflects coverage of a relatively basic category of lumber products in relation to heading 4418, which residing closer to the end of Chapter 44, HTSUS, reflects coverage of a relatively more advanced category of products. Heading 4407, HTSUS, provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm, Customs believes that, while not dispositive, the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) should always be consulted when resolving a particular classification question. *See* 54 Fed. Reg. 35127 (August 23, 1989). In this regard, the EN to heading 4407, HTSUS, state in relevant part:

> The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

Heading 4418, provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term **"joinery"** applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term **"carpentry"** refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, ect., and includes assembled shuttering for concrete constructional work.* * *

The agency's position is that the subject merchandise, but for the drilling, falls within heading 4407, HTSUS. The tariff issue to be resolved, therefore, is whether the drilling

should cause these articles to be considered as one of the relatively advanced articles provided for under heading 4418, HTSUS, that is, "builders' joinery and carpentry of wood." Upon further analysis of the competing tariff provisions, we do not believe the minimal addition of drilled holes to these articles is sufficient to change their classification.

At the time NY B81564 was issued, it was generally understood that the drilled studs were to be used for structural purposes, that is, for framing houses, and, consequently, the articles appeared to fall within the language of the EN to heading 4418, HTSUS. However, for the reasons that follow, we believe the conclusion, that this understanding causes the articles to fall under heading 4418, HTSUS, was in error. First, this understanding of the structural purpose of these articles exists whether or not the articles are drilled and, as stated above, notwithstanding the undrilled articles are generally understood to be used for the structural purpose of framing houses, they fall under heading 4407, HTSUS. Second, a close reading of the EN to heading 4418, HTSUS, suggests that the first and second paragraphs are to be read in relation to one another. In that respect, the language regarding the term "carpentry" appearing in the EN heading 4418, should be read in the context of the paragraph immediately preceding it so that heading 4418 applies only to woodwork used for structural purposes which is in the form of assembled goods or as recognizable unassembled pieces. In other words, the article must be in the form of an assembled good or exhibit some feature (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly) which qualifies it as a recognizable unassembled piece. It follows that, because the subject drilled softwood studs containing a hole which may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as a recognizable unassembled piece, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood.

Holding:

NY B81564 is revoked to reflect the proper classification of the subject drilled softwood studs in heading 4407, HTSUS.

The subject drilled softwood studs are properly classifiable in subheading 4407.10.0015, HTSUS, which provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm: coniferous: other: not treated: mixtures of spruce, pine and fir ("S-P-F"). The applicable rate of general duty is "Free".

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective for articles entered for consumption or withdrawn from warehouse for consumption 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 98–72)

UNITED STATES, PLAINTIFF *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, DAVID JORDAN, INC., AND FAR WEST INSURANCE CO., DEFENDANTS

FAR WEST INSURANCE CO., CROSS-CLAIMANT *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, AND DAVID JORDAN, INC., CROSS-DEFENDANTS

Court No. 96–02–00384

[Plaintiff seeks partial summary judgment in this action to recover lost customs duties and penalties. Defendant Joseph Almany and cross-claimant also seek summary judgment. *Held:* Plaintiff's motion for partial summary judgment granted. Defendant Joseph Almany's motion for summary judgment is rejected on procedural and substantive grounds. Cross-claimant's motion for summary judgment granted.]

(Dated June 3, 1998)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A. David Lafer, Franklin E. White, Jr.),* for plaintiff.

Joseph Almany, for defendants Joseph Almany and David Jordan, Inc.

Glad & Ferguson (T. Randolph Ferguson), for defendant and cross-claimant Far West Insurance Company.

OPINION

BACKGROUND

MUSGRAVE, *Senior Judge:* Plaintiff U.S. Customs Service ("Customs") alleges that defendant, Joseph Almany ("Almany"), entered goods into the stream of U.S. commerce in violation of 19 U.S.C. § 1592, which prohibits any person from entering goods into U.S. commerce by fraud or negligence and provides penalties for its violation. Customs alleges that Almany fraudulently used two invoices for his merchandise entries, one which stated the real value of the goods, and another actually submitted to Customs which undervalued the goods and resulted in the assessment of lower duties. Pursuant to its investigation and its powers under 19 U.S.C. § 1592, Customs fined Almany for the $5,016.87 owed in lost duties, and an additional $413,138.00 (the domestic value of the improperly entered merchandise) as a penalty for the fraud.

Customs initiated this action in February, 1996, to collect the penalty owed by Almany and his bond-holder surety, Far West Insurance Co. ("Far West"). On September 27, 1996, Customs filed a motion requesting admissions, to which Almany did not reply. On December 2, 1996, Customs moved this Court to deem the statements admitted and established. That same day, Almany served his response; however it was both untimely (more than 30 days overdue) and deficient (lack of defendant counsel's signature failed to comply with Rule 11 form, and absence of substantive, good faith responses failed to comply with Rule 36(a) form). Thus, on January 13, 1997, this Court granted Customs' motion and ordered that Customs' statements be deemed admitted and conclusively established pursuant to Rules 36(a) and (b) of the court.

Customs filed a motion for partial summary judgment on March 13, 1997. Customs asserts that as a result of this Court's Order, conclusively establishing Customs' admissions, there is no dispute regarding the elements which make out a violation of 19 U.S.C. § 1592. Thus, Customs seeks partial summary judgment on the issue of Almany's liability for customs penalties and lost customs duties, and Far West's liability as surety for lost customs duties. Such judgment would be partial to the extent that it would still remain to be determined whether Almany's actions constitute fraud, gross negligence or negligence under 19 U.S.C. § 1592, each category carrying with it a different fine.

Almany filed a motion to dismiss this action. However, the motion was filed late and is untimely; it should have at least been sent certified mail by May 12, 1997, to be considered received by the Court by that time. Instead, the motion is dated May 15, 1997, but was not sent certified mail and therefore was received and deemed filed on May 19, 1997.

Almany argues several points in his untimely motion. Almany alleges a failure to prosecute on the part of Customs and that Customs' claim is barred by the statute of limitations; requests that Judge Musgrave recuse himself; and requests that the Court dismiss or reconsider all prior rulings.

Finally, Far West filed a cross-claim against Almany and a motion for summary judgment on February 27, 1997. Far West admits that it is the surety for Almany, holding a continuous bond on Almany's merchandise, including that in this case. Far West asks the Court to order Almany to (1) indemnify and reimburse Far West for any and all sums paid to Customs under its bond plus expenses, and (2) exonerate Far West from any and all liability under its bond claimed by Customs. Far West contends that by this Court's order admitting Customs' statements conclusively, sufficient facts are established on which to grant it summary judgment.

Standard of Review

The Court has jurisdiction over this matter pursuant 28 U.S.C. §§ 1582 and 1583 (1994). The Tariff Act of 1930 establishes that the Court of International Trade shall review *de novo* a civil action com-

menced by the United States to recover customs duties and penalties. 19 U.S.C. § 1592(e) (1994).

The parties have moved for summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact * * * and the moving party is entitled to judgment as a matter of law." CIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "The party opposing summary judgment may not rest on its pleadings, but must respond with specific facts showing the existence of a genuine issue for trial." *Pfaff American Sales Corp. v. United States*, 16 CIT 1073, 1075 (1992) (citations omitted).

The Court of Appeals for the Federal Circuit considers the use of summary judgment to be an efficient mechanism for the resolution of disputes.

> The recent trilogy of Supreme Court cases establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"

Avia Group Int'l, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557 (Fed. Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); citing *Anderson v. Liberty Lobby*, 477 U.S. 242 and *Matsushita Electric Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The Court finds that no genuine issue as to any material fact exists and that partial summary judgment may be granted.

DISCUSSION

I. *Customs' motion for partial summary judgment"*

Customs is seeking partial summary judgment on the issue of Almany's liability under 19 U.S.C. § 1592 with material omissions and false statements made in connection with 23 entries of watches filed with Customs in Los Angeles.[1] Customs alleges that Almany knowingly, voluntarily and intentionally entered the merchandise by means of documents which understated the dutiable value, depriving the U.S. of $5,016.87 in lost duties.

19 U.S.C. § 1592 allows the government to collect much more than just the lost duties, depending on the level of culpability of the accused. This section prohibits the entering of any merchandise into U.S. commerce by fraud, gross negligence, or negligence. The penalties for each, in addition to Customs' claim for lost revenue, can be as much as the total domestic value of the merchandise for fraud, or multiples of the duties owed for negligence. Customs is alleging that Almany's actions rise to the level of fraud, and thus claims a penalty owed of $413,138.00 in

[1] Customs is proceeding against Joseph Almany, doing business as J.A. Imports, as well as David Jordan, Inc., which is the same business formerly known as J.A. Imports. There is a notice of name change (a Rider Name Change of Principal) in the record establishing that J.A. Imports is now David Jordan, Inc.; the president of David Jordan, Inc., is Almany's wife and its corporate address is the same as his home address. Far West Insurance Co. is also named as defendant because it holds a continuous bond for Almany and on the merchandise entered in this action, and is therefore liable as Almany's surety for duties owing on the merchandise. All these facts are deemed conclusively established by this Court's January 13, 1997, Order.

addition to the lost duties, representing the total domestic value of the imported watches. Customs is requesting partial summary judgment to declare that Almany is liable for violating 19 U.S.C. § 1592; the remaining issue will be a determination of the appropriate level of culpability under that section.

Because of this Court's January 13, 1997, Order "conclusively establishing" the facts of this case, Customs asserts that there are no genuine issues of fact in dispute. Those facts are that Joseph Almany entered merchandise using "double" invoices, one with the actual value of the merchandise, upon which appeared the words "actual" or "invoice paid on," and a second which was presented to Customs understating the value of the merchandise, on which Almany had handwritten "invoice presented to Customs." The use of documentation undervaluing the merchandise caused Customs to assess lower duties than were applicable, resulting in the loss of duties. Almany's activities were discovered in 1991 when a Customs officer inspected Almany's possessions and person upon his entry into Los Angeles from a business trip to Hong Kong, and the officer discovered both sets of "actual" and "presented to Customs" documentation on Almany.

19 U.S.C. § 1592 attaches liability to an entity who enters merchandise "by means of any document * * * which is material and false." Pl.'s Mot. for Partial Summ. J. at 8. Customs correctly notes that a "false invoice statement of price is, as a matter of law, a material false statement within the meaning of § 1592." *Id.* (citing *United States v. Modes, Inc.*, 16 CIT 879, 884–85 (1992)). The false statements are material because they prevented Customs from assessing proper duty amounts upon the merchandise. Customs properly submitted demands for payments and notification to Almany of their intent to assess and pursue a penalty, in accordance with its procedures.

Customs has established its entitlement to summary judgment. There is no dispute regarding the facts in this case, which demonstrate Almany's liability for 19 U.S.C. § 1592 violations. Equally valid is Customs' claim against Far West as surety for Almany, although Far West is only liable to the extent of the lost duties. The Court grants Customs' motion for partial summary judgment.

II. *Almany's motions*

Almany filed a motion to dismiss, which contained several motions in one document. These include: (A) motion to dismiss for failure to prosecute; (B) motion for summary judgment for failure to timely file complaint; (C) motion for recusal of Judge Musgrave; and (D) reconsideration of the ruling deeming Customs' admissions conclusively established. Almany has not responded to Customs' allegations nor replied to Customs' motion for partial summary judgment other than to submit this compilation of motions.

(A) *Failure to prosecute*:

Almany claims that this case must be dismissed due to a failure by Customs to appear for trial. The original scheduling order in this case

set trial for March 12, 1997, but this was amended to March 13, 1997, in an order of the Chief Judge dated Sept. 23, 1996. After this Court ruled on January 13, 1997 that all of plaintiff's admissions would be conclusively established, Customs moved to amend the scheduling order on the ground that a trial might not be necessary, and to allow it to file a motion for summary judgment. Customs served Almany, on February 18, 1997, with a motion to amend the scheduling order, but Almany never responded to that motion. Far West filed a motion for summary judgment on February 27, 1997, and Customs did the same on March 13, 1997, which resulted in a continuance of the trial. Almany made no reply until filing this motion to dismiss on April 7, 1997. Almany's claim that the government has forfeited its case by missing the trial "set" for March 13, 1997 has no merit, and nothing other than Almany's own failure to respond to and lack of due diligence in these proceedings account for ignorance of the fact that there is not now nor has there been an established trial date.

(B) *Failure to timely prosecute; statute of limitations*:

Almany argues that Customs' claim is barred by failure to bring action within the statute of limitations. The record demonstrates that Almany's alleged fraudulent activities were not discovered until March 21, 1991. The complaint in this case was filed on February 7, 1996, within 5 years of discovery as required by 19 U.S.C. § 1621 (1994) (actions commenced pursuant to 19 U.S.C. § 1592 must be brought within 5 years of discovery of the alleged offense). *See* Pl.'s Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. at 8 n. 6. Thus, Almany's asserted affirmative defense that the statute of limitations has run cannot stand and is rejected.

(C) *Recusal*:

Almany alleges several conversations took place between plaintiff's counsel Franklin White and Court of International Trade Clerk, Ms. Karen Modell. Almany asserts that these conversations rose to the level of *ex parte* communications, prejudicing the Court against Almany, and requiring recusal of the assigned Judge, Judge Musgrave. Although Almany singles out Judge Musgrave, to whom this case is assigned, Almany additionally makes the sweeping statement that it is impossible for him to receive a fair hearing before the *entire* Court of International Trade ("CIT") because of the "close and intimate relationship" between the CIT and the United States Department of Justice. Def.'s Opp'n Mem. to Pl.'s Mot. for Summ. J. ("Def.'s Mot.") at 2–3. Almany begs the Court to consider the absurdity that no CIT Judge could try a case in which the government is a party, and the Court declines this invitation.

It is not only part of the CIT Courtroom Clerk's standard procedure to speak with parties regarding scheduling of matters before the Court, it is the affirmative duty of the Clerk to do so. The Position Description itself states that the Courtroom Clerk shall "[c]onfer[] with attorneys," and "[s]erve[] as the main source of procedural information to attorneys for the scheduling or rescheduling of conferences, hearings and trials."

Almany and Customs agree that Franklin White of the Department of Justice was contacted by the CIT Courtroom Clerk assigned to this case, Ms. Karen Modell, regarding the trial set in this case. Because of this Court's January 13, 1997 Order establishing Custom's statements as admitted, Mr. White's response to Ms. Modell's inquiry was that a motion for summary judgment would be submitted in lieu of trial. This is normal procedure required by the Clerk's position, and this conversation does not rise to the level of *ex parte* communication (the Clerk is not expected to be involved in the decision making process and the communication was not relevant to the substance of the proceeding). Almany's claim here is also without merit and rejected.

(D) *Reconsideration of rulings*:

Almany is requesting this Court to reconsider its order deeming all admissions as conclusively established. Almany argues that he thought the motion requesting that Customs' admissions be accepted and conclusively established was "merely advisory" and that there was confusion as to whether the motion had actually been filed with the Court. Almany asserts that the government had a duty to call and inform him of inadequacies in his responses, and that the Justice Department's failure to do so prejudiced his case. Def.'s Mot. at 3–4.

Customs correctly reiterates the chain of events which render Almany's argument void of any merit. Almany never responded to Customs' September 27, 1996 request for admissions; Almany never filed a motion for extension of time; Almany finally filed responses in December, 1996, but they were not acceptable for failure to comply with CIT Rules 11 and 36(a). Further, Almany never responded to Customs' December 2, 1996 letter notifying Almany of its intention to file a motion to have admissions conclusively established; Almany never responded to the motion itself. Only in Almany's April 7, 1997 motion to dismiss does Almany contest this Court's Order deeming the statements conclusively established. Customs argues that Almany had ample time and opportunity to cure its own inadequacies and should not be allowed to do so now, three months after entry of the order. Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. at 5. There is no substantive ground on which to reconsider the order, and thus Almany's final motion is also without merit and rejected.

III. *Far West's motion for summary judgment*

Far West has held a continuous bond for Almany and his business, J.A. Imports (now known as David Jordan, Inc.), since 1987. Under that bond, Far West is liable as surety for the debt incurred by Almany to the extent of lost customs duties. This debt arises from the customs duties allegedly owed by Almany to Customs, in the amount of $5,016.87. Because Far West is surety for Almany, Customs named Far West in its complaint as being jointly liable for this claim against Almany.

Far West seeks summary judgment to compel Almany to indemnify and exonerate Far West under its bond. That is, should Customs prevail against Almany in this action, Far West would also be liable for Almany's owed duties. As a result of the Court granting Customs' motion for par-

tial summary judgment, *see I, supra*, Customs has prevailed against Almany. Indemnification and exoneration would absolve Far West of liability for Almany's debt. The Court notes that under its bond, Far West would only be liable for lost customs duties, while Almany would be liable for both lost duties and any penalty amount pursuant to 19 U.S.C. § 1592.

Far West argues that a surety, such as itself, is entitled to exoneration from its principal once the underlying debt has matured. Far West argues that under *Milwaukie Construction Co. v. Glen Falls Insurance Co.*, 367 F.2d 964 (9th Cir. 1966), there is a right of the surety to be protected by its principal, and the surety may ask the court to compel the principal to exonerate him: the surety "is not obliged to make inroads into his own resources when the loss must in the end fall on the principal." *Id.* at 966.

In *Milwaukie Construction*, the court held that where a surety knows that liability claims would be filed against it by its principal, the surety is able to obtain indemnification from the principal even though the surety did not know the amount of the claims. However, in that case, the contract between the parties explicitly provide for indemnity. *Id.* In this case, the record establishes the existence of a continuous bond between Far West and Almany's business, but the bond does not have an indemnification clause nor does Far West allege in its motion that there is such a contractual agreement between it and Almany. Far West relies on the well-settled principal that "equitable considerations" allow indemnification "irrespective of the existence of an express contract of indemnity." 74 Am.Jur.2d Suretyship § 171 (1974).

Far West further argues that a surety who pays the debt of the principal is entitled to recover the debt paid. 72 C.J.S., Principal and Surety § 230 (1987). Far West states that "[a]lthough [it] has not yet paid plaintiff's [Customs'] claim for lost revenue, it will be under an obligation to do so if judgment is entered in favor of plaintiff * * *. Accordingly, the Court should enter a judgment which requires defendants Joseph Almany and David Jordan, Inc. to reimburse Far West for any amounts paid to U.S. Customs." Mot. for Summ. J. on Cross-Cl. by Def. Far West at 6.

Far West is correct that a surety is entitled to reimbursement from its principal. However, a surety cannot seek reimbursement from the principal until the surety has actually paid the principal's debt. A surety could withhold payment on a debt which has become due, and, without paying, file a bill in equity or *quia timet* to compel the principal to exonerate the surety. In either event, a surety cannot be exonerated from liability on the principal's debt until the debt has matured and come due. *See Borey v. Nat'l Union of Fire Ins. Co.*, 934 F.3d 30 (2nd Cir. 1991) (alleged loss of *quia timet* and exoneration rights were not sufficient irreparable harm to justify preliminary injunction).

The debt in this case has matured and come due by virtue of the Court granting Customs' motion for partial summary judgment, *supra*. The

Court has found Almany liable for a violation of 19 U.S.C. § 1592, and, as a result, the debt which arises from this violation has matured. Thus, Far West's motion for summary judgment on the issue of indemnification and exoneration from Almany is appropriately before the Court and hereby granted.

CONCLUSION

For the foregoing reasons, Customs' motion for partial summary judgment and Far West's motion for summary judgment are granted. Almany's motions are denied.

(Slip Op. 98–73)

UNITED STATES, PLAINTIFF *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, DAVID JORDAN, INC., AND FAR WEST INSURANCE CO., DEFENDANTS

FAR WEST INSURANCE CO., CROSS-CLAIMANT *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, AND DAVID JORDAN, INC., CROSS-DEFENDANTS

Court No. 96–02–00384

(Dated June 4, 1998)

ORDER

MUSGRAVE, *Senior Judge:* The Court issues this Order to further clarify the question of representation presented by this case and to amend the recent opinion issued in this case. In Slip Op. 98–72 (June 3, 1998), the attorney for defendants Joseph Almany and David Jordan, Inc., was listed as Joseph Almany. However, the attorney of record for those two defendants during all relevant periods and for all submissions forming the basis of the opinion in Slip Op. 98–72 was David K. Geren. Mr. Geren attempted to withdraw from this case by submitting a Substitution of Attorney. The Substitution was defective however and the Court ordered Mr. Geren to correct the deficiency. *See United States v. Almany, et al.*, Slip Op. 98–66 (May 19, 1998). Mr. Geren did not correct that situation between the time of the issuance of Slip Op. 98–66 and Slip Op. 98–72, and is still the attorney of record on this case. In addition to seeking a swift resolution of this problem, the Court admonishes defendants Joseph Almany and David Jordan, Inc., that Mr. Almany may choose to represent himself *pro se*, as apparently was intended in the original and faulty Substitution, but that the corporate entity of David Jordan, Inc., requires counsel to proceed in this court. Therefore it is hereby

ORDERED that Slip Op. 98–72 be amended by striking the words *Joseph Almany* from page two, line three, and replacing them with *Law Offices of David K. Geren (David K. Geren);* and it is further

ORDERED that Mr. Geren submit to this Court a motion for withdrawal pursuant to USCIT R. 75(d), due to this Court within 10 days of the issuance of this Order; and it is further

ORDERED that Mr. Geren submit a Substitution of Attorney pursuant to USCIT R. 75(c) identifying the new attorney of record for both Joseph Almany and David Jordan, Inc., due to this Court within 10 days of the issuance of this Order.

(Slip Op. 98–74)

PRINCESS CRUISES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00352

[Plaintiff challenges Customs' imposition of arriving passenger fees ("APF") and Harbor Maintenance Tax ("HMT") fees on cruise ship passengers. *Held:* Passenger cruises that begin and end in APF-exempted ports do not trigger APF liability where layover stops are made at APF-covered ports. The HMT may not be imposed on the value of transportation services provided to cruise passengers.]

(Decided June 9, 1998)

Gibson, Dunn & Crutcher LLP (Judith A. Lee) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer and John K. Lapiana)* for defendant.

OPINION

MUSGRAVE, *Senior Judge:* In *U.S. Shoe Corp. v. United States*, 19 CIT 1284 (1995) *("U.S. Shoe")*, this Court held that the Harbor Maintenance Tax ("HMT") was unconstitutional as applied to exports. The decision was affirmed by the Court of Appeals for the Federal Circuit ("CAFC"), *U.S. Shoe Corp. v. United States*, 15 Fed. Cir. (T) ____, 114 F.3d 1564 (1997), and, finally, by the United States Supreme Court, *United States v. U.S. Shoe Corp.*, 118 S. Ct. 1290 (1998). Not explored, however, was the question of whether the constitutionally flawed statute applied to charges imposed upon shippers for the transportation of passengers.

Plaintiff, Princess Cruises, Inc.("Princess"), brought this action to contest the assessment and collection of arriving passenger fees ("APFs") and Harbor Maintenance Tax fees ("HMT fees") on passenger cruises by defendant, the United States Customs Service ("Customs"). Princess contends that cruises that originate or arrive directly from an APF-exempt port should not be assessed APFs. Princess also challenges the assessment of HMT fees on cruises originating and terminating in HMT-exempt ports, even when the cruise makes layover stops at HMT-covered ports. Finally, Princess contests the calculated value of the cruise upon which the HMT fees were based. The Court finds that the

APF does not attach to passengers whose cruise originates and terminates in an APF-exempted port. Further, the Court finds that the HMT may not be imposed on the value of transportation services provided to cruise passengers.

BACKGROUND

Princess is a wholly-owned indirect subsidiary of the Peninsular and Oriental Steam Navigation Company. Princess operates cruise ships around the world. At issue in this case are two Princess voyages known as the "Transcanal" and "Vancouver/Whittier" cruises. The Transcanal cruise journeys between Puerto Rico and Acapulco, traveling through the Panama Canal, and visits a number of ports in the Caribbean and South America. The Vancouver/Whittier cruise also travels between two ports, Vancouver, British Columbia and Whittier, Alaska and also stops at various ports en route. On both cruise routes, passengers board the cruise in either of the ports of origination and are assigned state rooms where they maintain a temporary residence until the termination port where passengers disembark. At the layover ports, some passengers temporarily go ashore for sightseeing or shopping while other passengers choose to remain aboard the ship.

Since the imposition of the HMT in 1987, Customs has been assessing and collecting the fees for all passengers aboard cruises that originate, layover and terminate in HMT-covered ports. In March 1991, Customs' Regulatory Audit Division ("RAD") began an audit of Princess' collection and remittance of APFs and shortly thereafter, began an audit of Princess' collection and remittance of HMT fees. Customs' APF audit examined the time period from July, 1986 through December, 1991 and the HMT audit examined the time period from 1987 through 1991. The APF audit was concluded in July, 1992 and the HMT audit was completed in May, 1992. As a result of the audits, Customs issued two bills to Princess for alleged underpayment of APFs and HMT fees. On March 23, 1993, Princess filed a protest challenging the assessment of both the APFs and the HMT fees and the associated interest charges. Princess also contends that Customs assessed the HMT based on an overvalued transportation charge. Customs denied Princess' protest in part on December 22, 1993 and Princess filed a summons and complaint with the Court under 28 U.S.C. § 1581(a).

STANDARD OF REVIEW

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."[1] However, the CAFC has found that the presumption of correctness applies solely to factual questions and that this Court's duty is to find the correct result. The duty of the Court to find the correct result stems from both legislative and judicial sources. The CAFC recently found that "the trial court * * * must consider whether the government's classification is correct, both independently and in

[1] 28 U.S.C. § 2639(a)(1) (1994).

comparison with the importer's alternative. * * * [T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). The issues before the Court are the interpretation of the APF and HMT statutes which are questions of law and are reviewed *de novo*.

Both parties have moved for summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." CIT R. 56. The Court finds that there is no genuine issue as to any material fact and therefore the Court has the power to render summary judgment.

Discussion

This case concerns two issues involved with the operation of cruise lines by Princess. The first issue concerns the application of APFs to two cruise routes operated by Princess. APFs attach to passengers that enter the U.S. from foreign ports. A number of foreign ports are exempted from APF liability and the controversy in this case focuses on the interpretation of the APF statute, specifically the meaning of "journey" and "arrival * * * from." The task for the Court is to demarcate the scope of APF coverage of cruise passengers' arrival from certain ports.

Princess also contests the application of HMT fees to cruises that originate and terminate at HMT-exempted ports but make layovers at HMT-covered ports. At the center of this issue is the definition of "port use" as described in the statute. The statute defines port use as the "loading or unloading" of cargo. The question for the Court is whether cruise passengers are subject to the HMT when they are "loaded" onto a cruise ship.

I. Application of APFs

The arriving passenger fee was a part of the Consolidated Omnibus Budget Reconciliation Act of 1986. The APF was codified at 19 U.S.C. § 58c as follows:

> § 58c. Fees for certain customs services
>
> (a) Schedule of fees
>
> (5) For the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside of the United States (other than a place referred to in subsection (b)(1)(A) of this section), $5.

19 U.S.C. § 58c(a)(5) (1988). Subsection (b)(1)(A) lists those ports that are exempted from APF liability.

> § 58c(b) Limitation on fees
>
> (1) No fee may be charged under subsection (a) of this section for customs services provided in connection with—

(A) the arrival of any passenger whose journey—
(i) originated in—
(I) Canada,
(II) Mexico,
(III) a territory or possession of the United States, or
(IV) any adjacent island (within the meaning of section 1101(b)(5) of title 8, or
(ii) originated in the United States and was limited to—
(I) Canada,
(II) Mexico,
(III) territories and possessions of the United States, and
(IV) such adjacent islands; * * *

19 U.S.C. § 58c (b)(1)(A) (1988). Princess contends that the statute directs Customs not to collect the APF when: (1) "passengers whose last stop prior to arrival into the United States was a place listed in subsection (b)(1)(A) * * *;" or when (2) "passengers whose cruise 'originated in' one of these places listed in subsection (b)(1)(A), * * *" Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at 15. Customs disputes Princess' reading of the statute and argues that the statute directs them to consider "all stages of an itinerary" which would include the port of embarkation, all layover stops and the port of disembarkation. Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. For Summ. J. ("Def.'s Mot.") at 27.

The Court finds that the term "journey" as found in the APF statute refers to the travel from origination to termination of the cruise. Therefore, any cruise that originates in an APF-covered port and terminates in the United States will be subject to the assessment of the APF. Likewise, any cruise that originates in an APF-exempt port, such as Acapulco or Puerto Rico, and terminates in the United States or an APF-exempt port does not trigger the APF. Further, the Court finds that layover stops do not affect the administration of the APF statute; simply stopping at an APF-exempt port as the last port of call does not exempt cruise passengers from APF liability. Similarly, layover stops at APF-covered ports do not, in and of themselves, trigger APF liability. A cruise is a single journey, and origination and termination ports are to be the only sites which occasion the imposition of APF liability.

Under this rubric, Princess' Transcanal cruise is exempt from APFs since the origination and termination ports of Acapulco and Puerto Rico are specifically designated as exempt ports in subsection (b)(1)(A). Similarly, Princess' Vancouver/Whittier cruise is exempt from APF liability because both origination and termination ports are APF-exempt ports under the statute. In Princess' Transcanal and Vancouver/Whittier cruises, passengers either begin their journey in the United States or a specified exempt port. Although Customs argues that the entire itinerary must be considered, the Court finds that passengers board a cruise

for the duration of the journey and when that journey begins and ends in an exempt port, APF attaches.

II. Application of HMT Fees

Both parties have developed rationales on the application of HMT fees and the corresponding value of transportation services entailed. The Court finds that the HMT fees are unconstitutional with respect to transportation services provided to cruise passengers just as the tax on exported cargo was found to be in *U.S. Shoe*. Consequently, the Court does not reach the issues of HMT applicability on exempt and non-exempt ports nor the computation of the value of transportation services.

In 1987, the HMT took effect with the avowed purpose of helping to finance the general maintenance of U.S. ports and specifically the dredging of U.S. ports. S. Rep. No. 99–126, at 9 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6639, 6646–47. The HMT was codified at 26 U.S.C. § 4461 and states: "General Rule * * * There is hereby imposed a tax on any port use." 26 U.S.C. § 4461(a) (1988). The statute defines "port use" as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from, a commercial vessel at port." 26 U.S.C. § 4462(a)(1) (1988). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, *including passengers* transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A) (1988) (emphasis added). In addition, Customs' regulations base the tax assessed on passengers "upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for comparable service if no actual charge is paid." 19 C.F.R. § 24.24(4)(i) ("transportation services").

Resolution of this issue turns on the holding in *U.S. Shoe*, where the Supreme Court confirmed that levying a tax on the value of commercial cargo loaded for export violated the Export Clause of the Constitution, U.S. Const., Art I, § 9, cl. 5. 118 S. Ct. 1290. The statute has equated passengers with cargo, and *U.S. Shoe* has held that taxing exports, or "loading," of cargo violates the Constitution. *Id*. Therefore, the "loading" of passengers must also violate the Constitution, even though passengers cannot be said to be "exported." The Court finds the solution in the common meaning of the term embark which is, together with Customs' regulations and findings, synonymous with the term loading. Webster's defines "embark" to mean "to go on board a vessel or a boat for a voyage; as, the troops *embarked* for Lisbon." Webster's New International Dictionary 2nd Edition, at 835 (1956) (emphasis in original).

Under 19 C.F.R. § 4.80a, Customs defines "embark" to mean

> a passenger boarding a vessel for the duration of a specific voyage and *disembark* means a passenger leaving a vessel at the conclusion of a specific voyage. The terms *embark* and *disembark* are not applicable to a passenger going ashore temporarily at a coastwise port who reboards the vessel and departs with it on sailing from the port.

19 C.F.R. § 4.80a(a)(4) (1989) (emphasis in original). Although Customs' definition appears in an unrelated section of its regulations, the Court finds that this definition comports with the common meaning of the

terms embark and disembark as well as load and unload with respect to passengers. The Court finds that embark, board and load all refer to the initial activity of passenger movement from port onto the vessel. In congruence with the statute equating cargo to passengers and the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, the Court finds that the HMT with respect to passengers also runs afoul of the Export Clause of the Constitution.

CONCLUSION

For the foregoing reasons, the Court finds that cruise passengers whose journey originates and terminates at APF-exempt ports are exempt from APFs. The Court also finds that cruise passengers are not subject to HMT liability.

(Slip Op. 98–75)

UNITED STATES, PLAINTIFF *v.* ROTEK, INC., DEFENDANT

Court No. 97–08–01311

[Defendant's motion to dismiss denied]

(Dated June 9, 1998)

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, *A. David Lafer*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau)*, *Lars-Erik A. Hjelm*, Assistant Chief Counsel (Baltimore), United States Customs Service, of counsel, for plaintiff.

Hogan & Hartson, L.L.P., (Lewis E. Leibowitz, Timothy C. Stanceu, and *Scott M. Deutchman)* for defendant.

OPINION

RESTANI, *Judge:* This action is before the court on defendant Rotek Inc.'s motion to dismiss for lack of jurisdiction and failure to state a claim pursuant to USCIT Rules 12(b)(1) and 12(b)(5) respectively. Specifically, defendant, an importer of ball bearing slewing rings, slewing bearings, and turntable bearings or slewing rings for bearing production, argues that the court lacks subject matter jurisdiction over its 19 U.S.C. § 1592 (1994) claim against Rotek, because Customs failed to exhaust its administrative remedies and thereby denied defendant an adequate opportunity to be heard. Rotek also argues the complaint fails to state a claim upon which relief may be granted. Defendant's motion is denied.

FACTUAL BACKGROUND

A. Pre-Penalty Notice

On March 14, 1997, Customs issued a Pre-Penalty Notice alleging that Rotek violated 19 U.S.C. §§ 1481, 1484 and 1592 (1994) by fraudu-

lently misdescribing and misclassifying 162 entries between April 24, 1991 and February 22, 1996. *Pre-Penalty Notice from Customs to Rotek* (Mar. 14, 1997), at Ex. A, 1, Def.'s App., Ex. 2, at 3 *("Pre-Penalty Notice")*. Customs further alleged that Rotek had misclassified 80 items imported between December 27, 1993 and February 16, 1996. *Id.* Customs noted that "[t]he continued misclassification of the subject commodities is material because it affected the liability for duty." *Id.* Customs listed its tentative determination as fraud, however,

> [i]nasmuch as the Government may plead in the alternative in any de novo proceeding before the Court of International Trade, Customs alternatively alleges that the violations in question occurred as a result of gross negligence or negligence.

Id.

Customs attached to the Pre-Penalty Notice an appraisal worksheet containing an entry-by-entry listing, including the date of entry, the entry number, the value of each entry, the duty paid, the manufacturer part number, the quantity of each entry, the duty rate, the duty due, the potential loss of duty for unliquidated entries, the actual loss of duty for liquidated entries, the liquidation date, and the description of the merchandise contained in the invoice. *Id.* at 3–13, Def.'s App., Ex. 2, at 5–15. Customs alleged $153,707.29 in potential revenue loss and $270,764.46 in actual losses, totaling $424,471.75. *Id.* at 4. The proposed monetary penalty was $3,395,774.00. *Id.*

Based upon the impending expiration of a previous one-year waiver of the statute of limitations,[1] Customs claimed that defendant could assert the statute of limitations defense for some of the entries as of April 24, 1997. *Id.* at 1. Pursuant to 19 C.F.R. §§ 162.77 and 162.78 (1997) which authorize Customs to shorten response times when less than one year remains before the statute of limitations can be raised as a defense, Customs required a written response within seven business days. Customs also stated that if it received a waiver of the statute of limitations within the 7 day period, Rotek would have thirty days to respond to the Pre-Penalty Notice. *Id.*

On March 24, 1997, defendant timely filed a response to the Pre-Penalty Notice objecting to Customs' allegations. *Response to Pre-Penalty Notice from Rotek to Customs* (Mar. 24, 1997), at 1, Def.'s App., Ex. 3.

B. Penalty Notice

On April 25, 1997, Customs at the Port of Baltimore issued a Penalty Notice and Demand for Payment. *Penalty Notice from Customs to Rotek* (Apr. 25, 1997), at 1, Def.'s App., Ex. 4, at 1 ("Penalty Notice"). The Penalty Notice stated a claim for alleged violations of 19 U.S.C. §§ 1481, 1484 and 1592. *Id.* at 3. The first sentence of the Notice of Penalty and

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[1] Defendant, at Customs' request, waived the statute of limitations for a period of one year, commencing on April 24, 1996. *Letter from Rotek to Customs* (Apr. 24, 1996), at 1, Def.'s App., Ex. 1.

Demand for Payment identifies a change from the Pre-Penalty Notice, stating:

> Noted on the attached EXHIBIT A is a *change in the information and facts set forth in our prepenalty notice* dated March 14, 1997. EXHIBIT A sets forth the entries, dates of entry, loss of revenue, description of merchandise, a statement of the laws or regulations violated, the material facts establishing the violation, and the tentative determination of culpability.

Id. (emphasis added).

The Penalty Notice alleged that "Rotek filed or caused to be filed 162 entries of 'bearings,' 'slewing rings,' and 'unfinished rings' at various ports between April 24, 1991 through February 22, 1996 which were *knowingly misdescribed* as 'conveyor turntables' or 'parts of conveyor systems.'" *Id.* at Ex. A, at 1, Def.'s App., Ex. 4, at 3 (emphasis added). The Penalty Notice claimed that "the description for the 'unfinished rings' and 'bearings' failed to comply with the special invoicing requirements of 19 CFR § 141.89. The misdescription was material in that it affected or had the potential to affect the classification of the imported merchandise and the liability for duty." *Id.* Of the 162 misdescribed entries, 41 were also alleged to be "knowingly misclassified subsequent to Rotek's receipt of written classification advice from Customs * * * resulting in an actual and potential loss of revenue." *Id.* Fifty eight entries (41 of which were identified above) were claimed to be "knowingly misclassified from April 14, 1995 through February 16, 1996." *Id.* Customs noted that:

> Rotek continued to file entries utilizing tariff classifications contrary to those it was instructed to use by Customs subsequent to its receipt of written classification advice from Customs via Customs Forms 29, which instructed Rotek to change the classifications from HTSUSA Number 8431.3900.10 to HTSUSA Number 8483.4090.00.

Id. The "continued misclassification" of the entries was material as it affected the liability for duty. *Id.* An appraisal worksheet attached to the Penalty Notice contains the facts of the alleged violations. *Id.* at Ex. A, at 3–14, Def.'s App., Ex. 4, at 5–16. Customs listed its tentative determination of culpability as gross negligence or alternatively, negligence. *Id.* at Ex. A, at 2, Def.'s App., Ex. 4, at 4.

The Penalty Notice alleged $83,177.47 in potential revenue loss and $7,918.06 in actual revenue loss, for a total of $91,095.53. *Id.* The proposed monetary penalty was $2,018,944.90. *Id.* Pursuant to 19 U.S.C. § 1592(d), Customs demanded "immediate payment of the actual loss of revenue." *Id.* The Penalty Notice stated that defendant could assert the statute of limitations as a defense against entries as of April 24, 1997 and, thus, required defendant to respond within seven business days. *Id.* at 1, Def.'s App., Ex. 4, at 1.

On May 6, 1997, counsel for the defendant submitted a Petition for Relief from Penalty to the Commissioner of Customs and the Fines, Pen-

alties and Forfeitures Office at the Port of Baltimore. *Petition for Relief from Rotek to Customs* (May 6, 1997), at 1, Def.'s App., Ex. 5.

C. Mitigation Decision

On May 27, 1997, Customs Headquarters notified Customs officials at the Port of Baltimore of its Mitigation Decision in response to defendant's Petition for Relief. *Mitigation Decision* (May 27, 1997), at 1, Def.'s App., Ex. 6, at 1. Defendant received a copy of the Mitigation Decision from Customs at the Port of Baltimore on May 30, 1997. *Id.* at 1.

After addressing the allegations contained in the Pre-Penalty, *id.* at 3–4, and Penalty Notices, *id.* at 4–5, as well as Rotek's respective responses to the Notices, *id.*, Customs concluded:

> that 133 entries filed during the period from July 2, 1992 through and including February 22, 1996, were misdescribed. Of those 133 entries, we also find that 41 entries filed during the period from April 14, 1995 through and including February 22, 1996, were also misclassified. Finally, we find that 17 entries filed during the period from April 18, 1995 through and including February 16, 1996, were misclassified only.
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> * * * * * * *
>
> The maximum penalty provided for by 19 U.S.C. section 1592 for findings of negligence is the lesser of the domestic value of the merchandise, or two times the lawful duties of which the United States is or may be deprived. 19 U.S.C. § 1592(c)(3). * * * Accordingly, we conclude that the penalty should be reduced to an amount equal to $643,303.14 which represents two times the loss of revenue (potential loss of revenue $131,983.43; actual loss of revenue $189,668.14), provided that petitioner tenders the actual loss of revenue, in the amount of $189,668.14.

Id. at 10–11, Def.'s App., Ex. 6, at 11–12.

Customs then discussed the procedures for the filing of a supplemental petition:

> The statute of limitations was available as a defense on April 25, 1997, and the petitioner has indicated its unwillingness to give a waiver in this case. Petitioner has the *right to file a supplemental petition* challenging any findings in this decision. You should therefore provide *seven business days for the payment of this penalty. If your office does not receive payment within this time, you should immediately forward the case to the Office of the Assistant Chief Counsel for referral to the Department of Justice. If a supplemental petition is filed before such referral, we will consider the supplemental, but the referral to the Department of Justice will continue.* If a supplemental petition is filed after the referral, please forward it to the Department of Justice through the Assistant Chief Counsel as provided for in 19 C.F.R. § 174.24. You may authorize extensions of this period only if the petitioner provides an acceptable waiver of the statute of limitations.

Id. at 11, Def.'s App., Ex. 6, at 12 (emphasis added).

Counsel for defendant, challenging the seven-day time limit as "draconian," requested an extension to file a supplemental petition. *Letter from Rotek to Customs* (June 2, 1997), at 2, Def.'s App., Ex. 7. Customs responded that defendant's June 2, 1997, letter "contains misstatements" and that:

> there is no shortened time frame for [Rotek] to file a supplemental decision, and as such, has the full 30 day period to file the supplemental petition; and if payment is not received within the seven day period, the case will be referred to the Department of Justice.

Letter from Customs to Rotek (June 2, 1997), at 1, Def.'s App., Ex. 8.

On June 5, 1997, Customs referred this case to the Department of Justice.[2] On June 10, 1997, seven business days from receipt of the Mitigation Decision, defendant submitted the supplemental petition for consideration by both the Secretary of the Treasury and the Customs Service. *Supplemental Petition for Relief from Penalty and Payment of Duty* (June 10, 1997), at 1, Def.'s App., Ex. 9 (*"Supplemental Petition"*). Defendant was notified on July 7, 1997, that the case had been referred to the Justice Department for a collection action before this court. *Letter from Justice to Rotek* (July 7, 1997), at 1, Def.'s App., Ex. 10. Defendant did not receive a response to the Supplemental Petition.

D. Complaint

This action was filed on August 8, 1997. The Complaint states that "[t]his is an action to enforce a civil penalty for violations of 19 U.S.C. § 1592 and to recover duties pursuant to 19 U.S.C. § 1592(d)," and identifies 132 entries imported between July 13, 1992, and February 22, 1996.[3] *Compl.*, at ¶¶ 1, 4. The 132 items are documented in Exhibit A, appended to the Complaint. *Id.* at Ex. A. The government alleged that Rotek made material false statements and omissions because the entry documentation failed to provide a detailed description of the merchandise, including each item's known commercial name, within the meaning of 19 U.S.C. § 1481(a)(3). *Id.* at ¶ 5. These false statements "had the potential to deprive the United States of duties due upon the merchandise covered by the entry numbers listed in Exhibit A." *Id.* at ¶6. The government alleged in its Complaint that as a result of Rotek's negligence, Rotek was

> liable to the United States pursuant to 19 U.S.C. § 1592(c)(3) for a civil penalty in the amount of $546,258.16, which represents two times the lawful duties, taxes, and fees of which the United States is or may be deprived.

Id. at ¶ 9. The government also claimed that Rotek was liable for "duties pursuant to 19 U.S.C. § 1592(d) in the amount of $163,080.95." *Id.* at ¶ 12.

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[2] June 5, 1997 was seven business days from the issuance of the Mitigation Decision to Customs Baltimore.

[3] Unlike the Mitigation Decision that included 133 entries, the Complaint included only 132 entries. This is because while the Mitigation Decision covered the period from July 2, 1992 through February 22, 1996, the Complaint covered a shorter period, from July 13, 1992 through February 22, 1996.

DISCUSSION

I.

In its motion to dismiss,[4] Rotek argues that this court lacks subject matter jurisdiction because Customs failed to exhaust its administrative remedies, depriving Rotek of its regulatory and statutory rights to notice and an opportunity to be heard. The court disagrees.

As an initial matter, this court has jurisdiction over customs fraud cases. 28 U.S.C. § 1582 (1994); *see United States v. Accurate Mould Co., Ltd.*, 4 CIT 81, 82, 546 F. Supp. 567, 568 (1982) ("In sum, Congress in enacting the Customs Court Act of 1980 provided this court, in plain and unambiguous language, with exclusive jurisdiction over all [19 U.S.C. § 1592] actions commenced on or after January 30, 1981."). Moreover, section 2637(d) of Title 28 states that "[i]n any civil action not specified in this section, the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1994) (emphasis added).

Because the present action arises under 19 U.S.C. § 1592 and is not specified in 28 U.S.C. § 2637(a)–(c), this court has discretion whether to waive the exhaustion requirement. *See* 19 U.S.C. § 2637(d); *United States v. Priority Products, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) ("Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement and hence the court may waive that requirement and reach the merits of the complaint."). Thus, the court must focus not on a rigid application of the agency's regulations, but rather, on whether the defendant was afforded sufficient opportunity to be heard so as to justify the court's retention of jurisdiction without further exhaustion of the administrative remedies. *See United States v. Obron Atl. Corp.*, 862 F. Supp. 378, 382 (Ct. Int'l Trade 1994) (finding jurisdiction where Customs improperly imposed 7 day response period because defendant was not deprived of opportunity to be heard as it submitted material and made oral presentations following both pre-penalty and penalty notices); *United States v. Modes, Inc.*, 13 CIT 780, 785, 723 F. Supp. 811, 815 (1989) (finding jurisdiction where Customs did not respond to supplemental petition because defendant was not deprived of opportunity to be heard as it made an oral presentation and was provided with a written determination stating findings of fact and conclusions of law supporting decision to mitigate); *but see United States v. Chow*, 17 CIT 1372, 1376, 841 F. Supp. 1286, 1289–90 (1993) (finding court lacked jurisdiction because Customs failed to exhaust administrative remedies and violated defendant's constitutional right to due process when Customs

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[4] Plaintiff urges this court to treat defendant's motion as one for summary judgment. USCIT R. 12(b) provides, in relevant part:

> If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

USCIT R. 12(b).

As there has been no opportunity for discovery and various facts related to the merits of this case appear in dispute, the court deems it inappropriate to treat the motion to dismiss as one for summary judgment. The facts set forth here are essentially agreed to and may be considered in connection with the motion to dismiss.

imposed improper 7 day response time and penalty notice lacked specificity).[5]

Rotek alleges that Customs deprived it of its statutory and regulatory rights to due process by: (1) changing the allegations and legal theories throughout the administrative process; (2) subjecting Rotek to seven day response periods even though the statute of limitations on the "valid" claims would not run for more than one year; and (3) referring the case to the Justice Department prematurely and not responding to Rotek's supplemental petition. Each of these claims are addressed below.

A. Changing allegations and legal theories

Section 1592 is the procedure by which Customs reviews alleged civil violations of U.S. customs laws. 19 U.S.C. § 1592. This procedure includes a mandatory Pre-Penalty Notice, 19 U.S.C. § 1592(b)(1), followed by a Penalty Notice upon Customs' determination that a violation has occurred, 19 U.S.C. § 1592(b)(2). Regarding the Penalty Notice, the statute provides that when Customs does establish that a violation occurred, "it shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided [in the Pre-Penalty Notice]." *Id.* Section 1592(b)(2) further provides that the importer will have an opportunity

> to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under such section 1618 [of this title], the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

Id.

Defendant argues that the Pre-Penalty Notice, Penalty Notice, Mitigation Decision and Complaint allege shifting, inconsistent claims regarding the pre-April 14, 1995 entries, depriving Rotek of its opportunity to be heard because each of Rotek's submissions required responding to new allegations and legal theories. Customs initially alleged in the Pre-Penalty Notice that the merchandise on all the subject entries generally was misdescribed *and* misclassified, and further alleged a revenue-loss violation of § 1592. *Pre-Penalty Notice*, at Ex. A, at 1, Def.'s App., Ex. 2, at 3. Rotek argues that the first change occurred from the Pre-Penalty Notice to the Penalty Notice, where Customs abandoned the revenue loss claim with respect to the pre-April 14, 1995 entries and instead alleged a non-revenue loss violation based on misdescription. Misclassification in addition to misdescription was not alle-

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[5] *Chow* rests upon alternative grounds, either one of which is sufficient. *Id.* The constitutional basis, however, is subject to debate. Where trial *de novo* is available before penalties are extracted, it is unlikely the constitutional due process rights are involved. Statutory and regulatory rights do not always give rise to property rights worthy of constitutional due process protection. *See NEC Corp. v. United States Dep't of Commerce*, 978 F. Supp. 314, 325–26 (Ct. Int'l Trade 1997).

ged. *Penalty Notice*, at Ex. A, at 1, Def.'s App., Ex. 4.[6] Rotek argues that the second change occurred from the Penalty Notice to the Mitigation Decision and the Complaint. Both allege revenue loss violations for all misdescribed entries. *Mitigation Decision*, at 10–11, Def.'s App., Ex. 6.

The court finds defendant's argument as to the change in allegations between the Penalty Notice and Pre-Penalty Notice meritless. Section 1592 itself provides that the Penalty Notice "shall specify all changes in the information provided" in the Pre-Penalty Notice, including the amount of penalty. 19 U.S.C. § 1592(b)(2). This language implies that changes are permissible as long as defendant has notice. The statute, therefore, contains no explicit prohibition against Customs changing a penalty based on revenue loss to non-revenue loss.

Moreover, although defendant argues that the allegations changed, it does not contest notice of the allegations and rightfully so. The record indicates that Rotek was on notice of the allegations. The Penalty Notice itself states "Noted on the attached EXHIBIT A is a *change in the information and facts* set forth in our prepenalty notice dated March 14, 1997." *Penalty Notice*, at 3, Def.'s App., Ex. 4 (emphasis added). Indeed, in its Petition for Relief, defendant articulates the change from the Pre-Penalty to the Penalty Notice, demonstrating awareness of any "new" allegations contained in the Penalty Notice. *Petition for Relief*, at 14–15, Def.'s App., Ex. 5.[7] Finally, defendant's argument that Customs changed the revenue/non-revenue loss classification from the Pre-Penalty Notice to the Penalty Notice without sufficient notification fails to consider that Customs' central claim, a violation of § 1592 through at least misdescription for specific entry items, remained consistent.

Rotek also argues that the Complaint contained allegations found only in the Mitigation Decision and not found in the Penalty Notice. Though defendant contends it did not receive adequate notice due to changes in the revenue/non-revenue loss classifications, and that such classification was a material fact required to be revealed under § 1592(b)(1)(A)(iv), the change did not prevent defendant from responding to the allegations of a § 1592 violation based on either fraud or negligence. The 132 items included in the Complaint were the exact items described in the Penalty Notice and the Mitigation Decision. There was, therefore, no question as to the exact identity of the entries at issue and the allegation that misdescription of the relevant entries may have violated § 1592. Thus, defendant was able to argue compliance with the statute notwithstanding the fact that the entries were treated differently with respect to the penalty calculation.

Moreover, Rotek's detailed factual and legal arguments contained in its Response to the Pre-Penalty Notice, Petition for Relief, and Supplemental Petition demonstrate that Rotek was on notice of the potential claims and did have adequate opportunity to participate in the adminis-

[6] The reason for this change is unclear. Because this case does not involve restricted merchandise, marking or country of origin issues, material misdescription must relate in some way to misclassification, either actual misclassification or anticipated misclassification based on the misdescription.

[7] The allegations, however, might be better described as simply refinements rather than "new" allegations.

trative proceedings. Rotek also had the opportunity to make oral presentations and meet with Customs officials on a number of occasions. *Mitigation Decision*, at 1, 4, Def.'s App., Ex. 6. Because Rotek fails to articulate how its multiple responses to the alleged § 1592 violation would have changed if it had known of the revenue loss allegation or how it was harmed, the court finds that further exhaustion of administrative remedies is not required.

B. Seven day response periods.

During the Pre-Penalty, Penalty and Mitigation phases, when less than one year remains before the statute of limitations can be raised as a defense, Customs is entitled to shorten response times for alleged violations of § 1592 from thirty to seven days. *See* 19 C.F.R. § 162.77–.78 (pre-penalty); 19 C.F.R. § 171.12 (petition for mitigation response time shortened if 180 days remaining). Here, the statute of limitations became available as a defense on April 25, 1997.

Defendant does not contest the calculation of the statute of limitations nor that a seven day response time in general was proper. Instead, defendant argues that the procedural irregularities in both the Pre-Penalty Notice and the Penalty Notice invalidated the claims against the earlier entries, leaving only entries where the statute of limitations defense would not be available within a year. Thus, without the invalid entries, Rotek should have received the full response time and was deprived of its right to be heard by receiving only 7 days.

Because this court has determined that the procedural errors did not invalidate Customs' claims as to the pre-April 14, 1995 entries, this argument fails.

C. Defendant's Supplemental Petition claims

Rotek contends that because of Customs' premature referral on June 5, 1997,[8] Customs failed to rule on Rotek's supplemental petition, filed on June 10, and thus denied Rotek its only opportunity to respond to the new allegations in the Mitigation Decision.

The regulations governing Customs' conduct are clear. A supplemental petition may be filed within either 30 days from the date of notice to the petitioner of the decision if no effective period is prescribed in the decision or the time prescribed in the decision. 19 C.F.R. § 171.33(a)(2) (1997).[9] A shortened response period does not deprive a defendant of its statutory right to a "reasonable opportunity" to be heard. *United States v. Ross*, 574 F. Supp. 1067, 1070 (Ct. Int'l Trade 1983) (seven day response time to file petition for mitigation is not an unreasonable burden). No action, however, shall be taken on a petition if the case has been

[8] Customs, in its Mitigation Decision, provided defendant with seven days to pay the penalty. *Mitigation Decision*, at 1, Def.'s App., Ex. 6. The Mitigation Decision, however, has two dates. Customs Headquarters sent the Mitigation Decision, date stamped May 27, to Customs Baltimore, which received it on May 29, 1997. *Id.* Customs Baltimore notified defendant by letter date stamped May 30, 1997. *Id.* The June 5, 1997 referral, therefore, occurred four business days after May 30, 1997, but seven business days after Customs Headquarters issued the Mitigation Decision. Any argument that the referral was not premature, based on the date Customs Baltimore was notified of the Mitigation Decision rather than the date defendant was notified, is unpersuasive as the mandatory minimum of 7 days to respond is for the benefit of the defendant, not Customs.

[9] In this case, the statute of limitations was already available as a defense to at least some entries.

referred to the Department of Justice to institute legal proceedings. 19 C.F.R. § 171.24 (1997).

If Rotek's argument was limited to the lack of response to its Supplemental Petition, the answer would be clear. The case had been referred to Justice and thus under the regulations, no action on the petition was taken. Here, however, the referral that prevented formal Customs action on Rotek's Supplemental Petition, was premature. According to the regulations, the time to respond is defined as "prescribed in the decision." Here, the decision stated that if Customs did not receive payment of the penalty within seven days, it was obligated to forward the case to Justice. If the petition was filed before the referral, Customs would consider the petition, but the referral to Justice would continue. Thus, the decision could be interpreted as granting defendant a window of seven days in which to respond to the Mitigation Decision and still have the supplemental petition reviewed. By referring the case to Justice prior to the seven days, Customs did not explicitly shorten the response time as defendant still had seven days. Rather, Customs created a situation that requires the court to evaluate whether the early referral harmed the defendant by rendering its opportunity to be heard by the agency a nullity.

In a case where the allegations against the defendant had remained the same throughout the administrative process, the answer also would be clear. The defendant would not have been deprived of appropriate process because the defendant had opportunities to respond at each stage of the proceedings. Here, however, Rotek argues that the Mitigation Decision changed the allegations and resulted in new findings of fact and conclusions of law. The Supplemental Petition was the only opportunity to respond to the new allegations and it was not considered by Customs due to the early referral. Whether this error was harmless depends on: (1) what exactly changed from the Penalty to the Mitigation stage; and (2) why Rotek's other responses were insufficient to address the "new allegations."

From a broad perspective, the allegations appear the same throughout the process. Customs alleged that the same entries into the same port violated § 1592 through misdescription. Rotek's response, again generally, to this allegation at any stage of the proceeding would be that the entries either were not misdescribed or that it was not culpable. In fact, Rotek admits that it presented all relevant factual data to Customs in earlier submissions. Its response to the Mitigation Decision presented legal arguments, similar to the arguments made here, which do not relate to the particular expertise of Customs and which could easily be considered by the Justice Department as well as Customs. Under the facts of this case the procedural error appears harmless.

II.

"On a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(5), the court assumes 'all well-pled factual allegations are true' and construes 'all reasonable inferences in favor of the nonmovant' in resolving whether the complaint sets forth facts sufficient to

support a claim." *Kemet Elects. Corp. v. Barshefsky*, 976 F. Supp. 1012, 1027 (Ct. Int'l Trade 1997) (internal citations omitted). The basis of the court's determination is limited to "the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Id.*

Rotek argues that the Complaint fails to state a claim upon which relief may be granted because it is based on the Mitigation Decision, instead of the Penalty Notice. This argument is unpersuasive. Both the Complaint and the Penalty Notice allege that the same 132 entries were entered misdescribed.

Defendant argues that an alternative ground for dismissal lies in the failure of the Complaint to allege an actionable violation of § 1592 because it insufficiently alleges causation between the alleged misdescription and the loss of revenue. The court is unpersuaded.

The elements of a § 1592 violation require that no person (1) "by fraud, gross negligence, or negligence" (2) "may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" (3) "by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false" or "any omission which is material." 19 U.S.C. § 1592(a)(1). Here, the Complaint alleges that Rotek negligently made 132 entries of merchandise at various ports by means of false statements and omissions. This is all that is required to state a claim pursuant to § 1592. Moreover, the Complaint alleges the amount of revenue loss. We must assume this factual allegation is true, leaving for trial the issue of whether the government can prove the revenue loss.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C98/57 5/21/98 Carman, C.J.	Delta Trades Int'l	90–6–00293	4202.99.0000.0 20%	3923.90.0000.9 3%	Agreed statement of facts	Los Angeles Pizza delivery pouches that are of plastic and have an exterior surface of plastic
C98/58 5/21/98 Carman, C.J.	Delta Trades Int'l	92–6–00405	4202.99.0000.0 20%	3923.90.0000.9 3%	Agreed statement of facts	Los Angeles Pizza delivery pouches that are of plastic and have an exterior surface of plastic
C98/59 5/22/98 Carman, C.J.	Delta Trades Int'l	92–8–00542, etc.	4202.99.9000 or 4202.92.90 20%	3923.90.0000 3%	Agreed statement of facts	Los Angeles Pizza delivery pouches that are of plastic and have an exterior surface of plastic
C98/60 5/22/98 Tsoucalas, J.	Tyco Dist. Corp.	96–7–01701	8507.30.80 4.6%	9503.80.00 No duty	Agreed statement of facts	Portland Style 2990 6v battery packs/charger sets, designed for use with Tyco's radio controlled (R/C) toy vehicles

Rules of the U.S. Court of International Trade

EFFECTIVE NOVEMBER 1, 1980

(AS AMENDED, [~~January 1, 1998~~] SEPTEMBER 1, 1998)

Amendments to Rules 3, 5, 56.2, 81, and 89

May 27, 1998

Effective Date:
September 1, 1998

NOTICE OF AMENDMENTS TO THE RULES OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE

The Court, on May 27, 1998, approved certain amendments to the Rules of the United States Court of International Trade, which will become effective on September 1, 1998. The Rules affected by these changes are: Rules 3, 5, 56.2, 81, and 89.

Copies of the amendments were transmitted to the following sources for publication:

Bureau of National Affairs, Inc.
Electronic Publishing
Fuglei & Associates (Customs Info)
Gould Publications
International Business Reports (Customs Record)
Lawyers Co-operative Publishing Co.
Legi-slate, Inc.
Matthew Bender & Co.
Mead Data Central (LEXIS)
Oceana Publications, Inc.
Office of the Law Revision Counsel (United States Code)
Rules Service Company
Shepard's/McGraw-Hill
United States Customs Service
Want Publishing Company
West Publishing Company (United States Code Annotated and Westlaw)

If you have obtained a copy of the Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

A copy of the amendments is available for examination in the Court's Library and the Case Management Section.

Dated: June 12, 1998.

RAYMOND F. BURGHARDT,
Clerk of the Court.

CHIEF JUDGE

Gregory W. Carman

JUDGES

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway

SENIOR JUDGES

James L. Watson
Herbert N. Maletz
Bernard Newman
Dominick L. DiCarlo
Nicholas Tsoucalas
R. Kenton Musgrave

Amendments to Rule 3

Rule 3 is amended as follows:

RULE 3. COMMENCEMENT OF ACTION

(a) *Commencement.* * * *
(b) *Filing Fee.* * * *
(c) *Complaint Fee.* * * *
(d) *Information Statement.* * * *
(e) *Amendment of Summons.* * * *
(f) *Notice to Interested Parties.* * * *
(g) *Precedence of Action.* * * *
(h) ***Special Rule for Actions Described in 28 U.S.C. § 1581(c).*** When an action is commenced under 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930 by the administering authority and such a determination by the Commission, a party shall file a separate summons and complaint with respect to each agency.

PRACTICE COMMENT: * * *
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PRACTICE COMMENT: Although this rule requires that the two agencies subject to suit under 28 U.S.C. § 1581(c) are in the first instance the subject of separate summonses and complaints, it does not prohibit consolidation of actions against the two agencies upon an adequate showing of ground for consolidation.

(As amended, Nov. 4, 1981, eff. Jan. 1, 1982; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Sept. 25, 1992, eff. Jan. 1, 1993; Nov. 29, 1995, eff. Mar. 31, 1996; **May 27, 1998, eff. Sept. 1, 1998.**)

Amendments to Rule 5

Rule 5 is amended as follows:

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) *Service—When Required.* * * *
(b) *Service—How Made.* * * *
(c) *Service—Numerous Defendants.* * * *
(d) *Filing—When Required.* * * *
(e) *Filing—How Made.* * * *
(f) *Filing of Summons and Complaint by Mail.* * * *
(g) *Proof of Service.* * * *
(h) *Filings Containing Business Proprietary Information in an Action Described in 28 U.S.C. § 1581(c).* In an action described in 28 U.S.C. § 1581(c), a pleading, motion, brief or other paper containing business proprietary information shall identify that information by enclosing it in brackets. A party shall file and serve a pleading, motion, brief or other paper in accordance with any deadline established by these rules or by order of the court. A non-confidential version in which the business proprietary information is deleted shall accompany a confidential version of a pleading, motion, brief or other paper. However, when the original pleading, motion, brief or other paper includes the statement "Bracketing of Business Proprietary Information not Final for One Business Day after Date of Filing" on the cover of every document containing business proprietary information and on each page containing business proprietary information, then a party may file and serve the non-confidential version within one day of the filing of that pleading, motion, brief or other paper, together with a complete revision of the original filing, if necessary, that is identical to the original in all respects except for any bracketing corrections. When the original states that the bracketing is not final for one business day after the date of filing, recipients of the document may not, until the bracketing is finalized, disclose the contents of the document to anyone not authorized to receive business proprietary information in the action.

PRACTICE COMMENT: * * *
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PRACTICE COMMENT: Rule 5(h) applies a "one day lag rule" to a submission containing business proprietary information. Practitioners should note that this rule does not act to extend any deadline set forth in these rules or by order of the court. Its only effect on the timing of a submission is to provide one day for a party to prepare a non-confidential version of its submission and to prepare any correction in the bracketing of business proprietary information. In making special provision for filing sin an action brought under 28 U.S.C. § 1581(c), this rule likewise does not excuse those filings from other requirements, such as those in Rule 81(h), applicable to a submission containing confidential information.

(As amended, eff. Jan. 1, 1982; Oct. 3, 1994, eff. Jan 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; Nov. 29, 1995, eff. Mar. 31, 1996; **May 27, 1998, eff. Sept. 1, 1998.**)

CHIEF JUDGE

Gregory W. Carman

JUDGES

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Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway

SENIOR JUDGES

James L. Watson
Herbert N. Maletz
Bernard Newman
Dominick L. DiCarlo
Nicholas Tsoucalas
R. Kenton Musgrave

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(As amended, eff. Jan. 1, 1982; Oct. 3, 1994, eff. Jan 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; Nov. 29, 1995, eff. Mar. 31, 1996; May 27, 1998, eff. Sept. 1, 1998.)

Amendments to Rule 56.2

Rule 56.2 is amended as follows:

RULE 56.2. JUDGMENT UPON AN AGENCY RECORD FOR AN ACTION DESCRIBED IN 28 U.S.C. § 1581(c)

(a) *Proposed Briefing Schedule and Joint Status Report.* * * *
(b) *Cross-Motions.* * * *
(c) *Briefs.*

(1) * * *

(2) The brief shall include the authorities relied upon and the conclusions of law deemed warranted by the authorities. All references to the administrative record shall be made by citing the portions of the record relevant to the factual or legal issues raised. Citations shall be by page number of the transcript, if any, and by specific identification of exhibits together with the relevant page number. The brief also shall include a table of contents[,] and a table of authorities [~~and an appendix containing a copy of those portions of the record cited in the brief~~].

(3) Within three days of the date of filing of a brief, the party submitting the brief shall file an appendix containing a copy of those portions of the administrative record cited in the brief.

(d) *Time to Respond* * * *
(e) *Hearing.* * * *
(f) *Partial Judgment.* * * *
(g) *Voluntary Dismissal—Time Limitation.* * * *

PRACTICE COMMENT: Provided its requirements are followed, Rule 5(h) allows for the filing of a non-confidential version of a brief provided for in this rule, and a confidential version correcting the designation of business proprietary information in the original submission, one business day after the original filings under this rule.

(Added Sept. 25, 1992, eff. Jan. 1, 1993; and amended Oct. 5, 1994, eff. Jan. 1, 1995; May 27, 1998, eff. Sept. 1, 1998.)

Amendments to Rule 81

Rule 81 is amended as follows:

RULE 81. PAPERS FILED—CONFORMITY—FORM, SIZE, COPIES

(a) *Conformity Required.* * * *
(b) *Means of Production.* * * *
(c) *Caption and Signing.* * * *
(d) *Numbering of Pages.* * * *
(e) *Designation of Originals.* * * *
(f) *Pleadings and Other Papers.* * * *
(g) *Status of Action.* * * *
(h) *Confidential Information.* * * *
(i) *Briefs—Trial and Pretrial Memoranda.* * * *
(j) *Content—Moving Party's Brief.* * * *
(k) *Content—Respondent's Brief.* * * *
(l) *Content—Reply Brief.* * * *
(m) *General.* * * *
PRACTICE COMMENT: * * *
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PRACTICE COMMENT: For an action under 28 U.S.C. § 1581(c), Rule 5(h) contains requirements for designating of business proprietary information and the form of notification required when a party desires to delay filing a non-confidential version of a submission by one business day.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Nov. 29, 1995, eff. Mar. 31, 1996; May 27, 1998, eff. Sept. 1, 1998.)

Amendments to Rule 89

Rule 89 is amended as follows:

RULE 89. EFFECTIVE DATE

(a) *Effective Date of Original Rules.* * * *
(b) *Effective Date of Amendments.* * * *
(c) *Effective Date of Amendments.* * * *
(d) *Effective Date of Amendments.* * * *
(e) *Effective Date of Amendments.* * * *
(f) *Effective Date of Amendments.* * * *
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(n) Effective Date of Amendment. * * *
(o) *Effective Date of Amendments.* * * *
(p) *Effective Date of Amendments.* * * *
(q) *Effective Date of Amendments.* * * *
(r) ***Effective Date of Amendments.*** **The amendments adopted by the court on May 27, 1998 shall take effect on September 1, 1998. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.**

(Added Nov. 4, 1981, eff. Jan. 1, 1982; and amended Dec. 29, 1982, eff. Jan. 1, 1983; Oct. 3, 1984, eff. Jan. 1, 1985; June 19, 1985, eff. Oct. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987, July 28, 1988, eff. Nov. 1, 1988, Oct. 3, 1990, eff. Jan. 1, 1991; Mar. 1, 1991, eff. Mar. 1, 1991; Sept. 25, 1992, eff. Jan. 1, 1993; Oct. 5, 1994, eff. Jan. 1, 1995; June 1, 1995, eff. June 1, 1995; Nov. 29, 1995, eff. Mar. 31, 1996; Aug. 29, 1997, eff. Nov. 1, 1997; Nov. 14, 1997, eff. Jan. 1, 1998; **May 27, 1998;** Sept. 1, 1998.)

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